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CALIFORNIA JURISPRUDENCE

A COMPLETE STATEMENT
OF THE LAW AND PRACTICE
OF THE STATE OF
CALIFORNIA

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and Practice, Etc.

VOLUME VIII

CRIMINAL LAW, § 138, TO DECISIONS

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P. EVIDENCE.**I. INTRODUCTORY.**

§ 138. **Rules of Evidence.**—The object of a trial is to elicit the real state of the transaction, and the rules governing the introduction of evidence have relation to this end.¹ These rules are not mere arbitrary conventional regulations but are founded in reason and good sense.² In the main it is true that "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided,"³ but there are some rules which are different. For example, in civil actions it is a general rule that evidence of the good character of the defendant is irrelevant and inadmissible save in a few exceptional cases,⁴ whereas in criminal actions the defendant may always introduce evidence of his good character for the traits involved in the crime charged.⁵ Again, the rule as to the sufficiency of the evidence to authorize a verdict and judgment differs in civil and criminal actions, a preponderance of evidence being sufficient in the former, and proof beyond a reasonable doubt being necessary in the latter.⁶ There are other rules also peculiar to criminal actions, such as the rules of evidence relating to confessions⁷ and dying declarations.⁸

§ 139-140. **Judicial Notice.**—In criminal as in civil cases courts take judicial notice of matters of fact which are within the common knowledge of all or are of such

1. See EVIDENCE.

2. *People v. Arnold*, 15 Cal. 476, 481.

3. Pen. Code, § 1102; *People v. Manghs*, 149 Cal. 253, 264, 86 Pac. 187; *People v. Hartman*, 130 Cal. 487, 62 Pac. 823; *People v. Murphy*, 45 Cal. 137, 144. For the rules

of evidence in civil cases, see EVIDENCE.

4. *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909. And see EVIDENCE.

5. See *infra*, § 163.

6. See *infra*, § 258.

7. See *infra*, § 199 et seq.

8. See HOMICIDE.

general notoriety as to need no evidence in their support, and also of those matters which do not depend upon the weight of conflicting evidence, but are in their nature fixed and uniform, and may be determined by mere inspection of a public document, or by demonstration as in the calculations of an exact science.⁹ The rules pertaining to this branch of the law of evidence and their application are the same in criminal as in civil cases. Accordingly, the entire subject is referred to another article in this work where the rationale of the doctrine and its application in detail are fully considered with citation of both civil and criminal cases.¹⁰

II. PRESUMPTIONS.

§ 141. **In General.**—A presumption is defined by the code to be a deduction which the law expressly directs to be made from particular facts.¹¹ It is distinct from an inference in that it is binding upon the jury unless controverted by other evidence, whereas they are the exclusive judges of the weight and validity of an inference.¹² While elsewhere there is some confusion as to the probative force of presumptions, subdivision 2 of section 2061 of the Code of Civil Procedure, requiring the jury to be instructed that they are not bound to decide “against a presumption or other evidence” satisfying their minds, contains a distinct recognition of the fact that a presumption is evidence, and that it may outweigh the positive testimony of witnesses against it.¹³ While a disputable presumption has no weight as against a fact proved or

9. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

10. See EVIDENCE.

11. Code Civ. Proc., § 1959. For full consideration of the subject of presumptions, see EVIDENCE.

12. *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

13. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *People v. Williams*, 24 Cal. App. 616, 142 Pac. 124. See *infra*, § 581. See, also, EVIDENCE.

admitted, in other cases it remains with the jury to say whether a presumption has been overcome by the proof of a fact against it.¹⁴

§ 142. Innocence.—It is a cardinal rule in all criminal cases that a defendant “is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.”¹⁵ The presumption of innocence is a disputable one,¹⁶ which attends an accused from the first of the trial to the last.¹⁷ It does not cease upon the submission of the case to the jury, but it operates not only during the taking of testimony, but also during the deliberation of the jury, until they have arrived at a verdict.¹⁸ It has been said, however, that the presumption does not attend the accused so far as the proceedings intermediate the indictment and trial are concerned, but that the indictment raises a presumption of guilt which controls all such proceedings, including that of admission to bail.¹⁹ The conviction of one of two persons jointly

14. *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *People v. Wong Sang Lung*, 3 Cal. App. 221, 224, 84 Pac. 843.

15. Pen. Code, § 1096; *People v. Tom Woo*, 181 Cal. 315, 328, 184 Pac. 389; *People v. Sanders*, 114 Cal. 216, 236, 46 Pac. 153; *People v. Strassman*, 112 Cal. 683, 45 Pac. 3; *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v. Phillips*, 27 Cal. App. 409, 150 Pac. 75; *People v. Allison*, 25 Cal. App. 746, 145 Pac. 539. See, also, Code Civ. Proc., § 1963, subd. 1.

16. *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389, 394.

17. *People v. Devine*, 95 Cal. 227, 30 Pac. 378.

18. *People v. Arlington*, 131 Cal. 231, 235, 63 Pac. 347; *People v. O'Brien*, 106 Cal. 104, 39 Pac. 325; *People v. McNamara*, 94 Cal. 509, 514, 29 Pac. 953.

19. *Ex parte Ryan*, 44 Cal. 555; *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77. Compare *People v. Schmidt*, 33 Cal. App. 426, 429, 165 Pac. 555, where the court say the matter of the production of an indictment by a grand jury or commitment by a magistrate neither presupposes the guilt of a defendant nor in anywise tends to create any presumption in that direction. It merely furnishes a procedure by which the defendant is brought into court. See *BAIL AND RECOGNIZANCE*, vol. 3, p. 1021.

or severally indicted for the same offense does not raise a presumption that the other is innocent.²⁰

§ 143. Sanity and Insanity.—All persons are presumed to be sane until the contrary is proved.¹ But when a defendant proves the existence of habitual insanity prior to the commission of the offense, such insanity will be presumed to continue unless the contrary is shown.² This presumption has no application to a temporary insanity. To establish the basis for it, the insanity proved must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility, or even probability, of its recurrence, as would be the case if its existence appeared to be temporary.³ The language of some of the earlier decisions in this connection is subject to criticism in that they refer to insanity produced by a temporary or transient cause. Permanent insanity may result from a temporary cause, while a continuing cause may produce only a temporary insanity. It is the character of the insanity rather than its cause which determines whether there is a presumption of continuance.⁴ The presumption of continuance of insanity does not apply to that form of disease known as delirium tremens, brought on by one's own procurement and passing away with the removal of the exciting

20. *People v. Johnson*, 47 Cal. 122.

1. *People v. Williams*, 184 Cal. 590, 94 Pac. 1019; *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720. See *supra*, § 20. And see *INSANE PERSONS*.

2. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6; *People v. Findley*, 132 Cal. 301, 307, 64 Pac. 472; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204; *People v. Lane*, 101 Cal. 513, 519, 36 Pac. 16; *People v. Farrell*,

31 Cal. 576, 581; *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222.

3. *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204 (limiting *People v. Francis*, 38 Cal. 183).

4. See for example, *People v. Francis*, 38 Cal. 183, holding there is a presumption of continuance of insanity once shown to exist "if it be shown that the intellectual faculties were so impaired as to produce a general habitual derangement of them, not traceable to some temporary cause."

cause.⁵ When it is shown that a defendant had lucid intervals, it will be presumed that he was in one of them when he committed the crime.⁶

§ 144. Intent and Knowledge.—The intent with which an unlawful act was done must be proved as well as the other material facts stated in the indictment or information.⁷ But except when a specific intent is an essential element of an offense, the law presumes that one who voluntarily and willfully does an unlawful act intended to do what he did do and intended all the natural, probable and usual consequences of his act unless there is evidence to controvert this presumption.⁸ As stated in a recent case: "The moving intent was evidenced by the acts of the party and the presumption of law that he intended the ordinary consequences of his acts."⁹

A defendant is not presumed to have intended all possible consequences of his act, however. For example, if blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought necessary to make the crime murder.¹⁰

5. *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222. Compare *People v. Ferris*, 55 Cal. 588, 591 (where the court speaks of "delirium tremens, or some other permanent form of insanity").

6. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6.

7. *People v. Harris*, 29 Cal. 678; *People v. Pool*, 27 Cal. 572, 576.

8. *People v. Richardson*, 161 Cal. 552, 564, 120 Pac. 20; *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Wright*, 93 Cal. 564, 29 Pac. 240; *People v. Munn*, 65 Cal. 211, 3 Pac. 650; *People v. Harris*, 29 Cal. 678; *People v. Ab-*

bott, 2 Cal. Unrep. 383, 4 Pac. 769; *People v. Wong Hing*, 28 Cal. App. 230, 151 Pac. 1159; *People v. Moxley*, 17 Cal. App. 466, 120 Pac. 43; *People v. Wolfrom*, 15 Cal. App. 733, 115 Pac. 1088; *People v. Leavens*, 12 Cal. App. 178, 185, 106 Pac. 1103.

It is presumed that an unlawful act was done with an unlawful intent. Code Civ. Proc., § 1963, subd. 2.

9. *People v. White*, 5 Cal. App. 329, 334, 90 Pac. 471 (citing Pen. Code, § 20; Code Civ. Proc., §§ 1962, 1963).

10. *People v. Munn*, 65 Cal. 211, 3 Pac. 650. See *HOMICIDE*.

Specific intent.—Except in cases of murder, in which a contrary rule is established by statute,¹¹ wherever a specific intent is an element of an offense, the existence of that intent must be established as a fact by such evidence as will warrant a conclusion to that effect by the jury. It is not to be presumed from the commission of the unlawful act,¹² though the jury may infer it from the acts and conduct of the defendant.¹³ This is true wherever the crime falls short of homicide, even if it be the crime of assault with intent to commit murder.¹⁴

Knowledge.—While there are cases in which there is a duty resting upon a person to make a fair and reasonable inquiry and the law will presume that he knows everything that he can learn upon such inquiry, no such presumption arises in cases where a special intent is required to make out the offense. A failure to know through gross negligence is not the equivalent of knowledge. If a case could arise, however, in which it should appear that a party suspected a fact, and abstained from inquiry lest he should know, it has been said that knowledge might be inferred.¹⁵

§ 145. Character.—While it has been said that the law presumes that a defendant who is upon trial for an offense has a good character,¹⁶ the correct rule, on the contrary, is that the law presumes nothing in respect to a defendant's general reputation. In the absence of all proof on the subject, his character is not to be taken as

11. See HOMICIDE.

12. *People v. Richardson*, 161 Cal. 552, 565, 120 Pac. 20; *People v. Jones*, 160 Cal. 358, 370, 117 Pac. 176; *People v. Johnson*, 106 Cal. 289, 295, 39 Pac. 622; *People v. Landman*, 103 Cal. 577, 37 Pac. 518; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082; *People v. Mize*, 80 Cal. 41, 22 Pac. 80.

13. See *infra*, § 338.

14. *People v. Jones*, 160 Cal. 358, 371, 117 Pac. 176.

15. *People v. Brown*, 74 Cal. 306, 16 Pac. 1.

16. *People v. Gleason*, 122 Cal. 370, 55 Pac. 123; *People v. Fair*, 43 Cal. 137, 149; *People v. Rippe*, 32 Cal. App. 514, 163 Pac. 506; *People v. Davis*, 1 Cal. App. 8, 13, 81 Pac. 716, 88 Pac. 1101.

either good or bad, and the jury are not authorized by assuming it to be one or the other, to let it have weight in inclining them toward an acquittal or conviction. Any presumption against bad character is contained in the presumption of innocence, and any assumption of good character as to justify a higher probability of innocence than results from the general presumption of innocence can only appear by evidence, which the prosecution will, upon its admission, be allowed to contradict.¹⁷

§ 146. Other Presumptions.—Identity of person is presumed from identity of name.¹⁸ This presumption can be invoked only in a case where a name is to be applied to a particular person involved. If the name be a common one in the vicinity, or if it be shown that there is more than one person to whom the name may be applied, no presumption of identity can arise.¹⁹ Since it is optional with a defendant whether to introduce any evidence, no presumption is raised against him from his failure to do so.²⁰ Nor can any presumption be indulged against him by reason of his failure to take the witness-stand and testify.¹ Although there is a presumption from the production of inferior evidence that higher evidence would be adverse,² no presumption arises from the failure of a defendant to call witnesses to corroborate his testimony, as their testimony is not higher than his.³ A

17. *People v. Griffith*, 146 Cal. 339, 80 Pac. 68 (explaining *People v. Gleason*, 122 Cal. 370, 55 Pac. 123); *People v. Johnson*, 61 Cal. 142; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969, citing *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662.

18. *People v. Rolfe*, 61 Cal. 540; *People v. Mullen*, 7 Cal. App. 547, 94 Pac. 867.

19. *People v. Wong Sang Lung*,

3 Cal. App. 221, 84 Pac. 843. See EVIDENCE.

20. *People v. Streuber*, 121 Cal. 431, 53 Pac. 918, followed in *People v. Cuff*, 122 Cal. 589, 55 Pac. 407.

1. *People v. Streuber*, 121 Cal. 431, 53 Pac. 918; *People v. Anderson*, 39 Cal. 703. See *infra*, § 395.

2. Code Civ. Proc., § 1963. See EVIDENCE.

3. *People v. Dole*, 122 Cal. 486, 68 Cal. 50, 55 Pac. 581.

person acting as if he were conscious is presumed to be conscious.⁴ The flight of a person immediately after the commission of a crime is a circumstance to be considered by the jury, but it does not give rise to a presumption of guilt.⁵

§ 147. Conflicting Presumptions.—Many disputable presumptions are overcome by and cannot be indulged against the presumption of innocence.⁶ For example, in a prosecution for perjury of a defendant in testifying to his ownership of certain property, it is not sufficient for the prosecution to prove ownership in another at a previous time and then rely on the presumption of continuance of ownership.⁷ So, also, when delivery of a deed is a material element of the crime of selling land twice, the presumption of delivery which follows from possession of an instrument cannot be indulged against the presumption of innocence.⁸ Again, while an inference of chastity may be drawn by the jury in a prosecution in which the previous chastity of a female is an element, it is error to instruct the jury that the law presumes chastity.⁹

Upon the other hand, it is not the law that the presumption of innocence prevails over all other presumptions of whatsoever kind or nature. This presumption does not overcome conclusive presumptions and certain

4. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916.

5. *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69.

6. *Hunter v. Hunter*, 111 Cal. 261, 52 Am. St. Rep. 180, 31 L. R. A. 411, 43 Pac. 756 (limiting *People v. Stokes*, 71 Cal. 263, 12 Pac. 71). See *People v. Douglass*, 100 Cal. 1, 34 Pac. 490, where the court says there cannot be two presumptions in a criminal case, one in favor of innocence, the other in favor of a criminal course. Cited in *State v. Blaine*, 45 Mont. 482,

124 Pac. 516, in support of a ruling refusing an instruction that where there are two presumptions the one in favor of innocence must prevail. See *BIGAMY*, vol. 4, p. 346, as to presumption of continuance of life once shown to exist.

7. *People v. Strassman*, 112 Cal. 683, 45 Pac. 3. See *PERJURY*.

8. *People v. Scott*, 24 Cal. App. 54, 141 Pac. 945. See *DEEDS*.

9. *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297; *People v. Roderigas*, 49 Cal. 11. See *infra*, § 353.

disputable presumptions,—the presumption of sanity, for instance. While evidence of insanity may be introduced to overcome the presumption of sanity, in the absence of evidence, the presumption of innocence would not prevail so as to justify a jury in presuming against sanity.¹⁰

III. BURDEN OF PROOF.

§ 148. **In General.**—In all criminal cases the burden of proof rests upon the prosecution.¹¹ When a defendant in a criminal case, other than one of homicide, does not rely upon a distinct, separate or independent fact, such as insanity, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof never shifts, but remains upon the people throughout the whole case to prove every fact essential to conviction beyond a reasonable doubt.¹² Except in those cases in which the duty to introduce evidence shifts to the defendant, it is not necessary or incumbent upon him to explain anything. He is certainly not required to prove his innocence,¹³ nor is he required to prove circumstances of mitigation, justification or excuse,¹⁴ except in the single case of homicide as to which a special rule has been prescribed by statute.¹⁵ It is wholly a matter of choice on his part,

10. *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517.

11. *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *People v. Cheong Foon Ark*, 61 Cal. 527. See *ABDUCTION*, vol. 1, p. 96. See note, 13 A. L. R. 1446, as to burden on state to show that crime was committed within limitation period.

12. *People v. Ribolsi*, 89 Cal. 492, 500, 26 Pac. 1082; *People v. Gordon*, 88 Cal. 422, 26 Pac. 502; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

As to shifting the burden of proof generally, see *EVIDENCE*.

13. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137; *People v. Bickerstoff*, 31 Cal. App. Dec. 970, 190 Pac. 656; 59 Cal. 611; *People v. Mock Yick Gar*, 14 Cal. App. 334, 337, 111 Pac. 1039.

14. *People v. Gordon*, 88 Cal. 422, 26 Pac. 502.

15. See *HOMICIDE*.

This exception is confined to

whether to attempt an explanation of incriminating circumstances or to remain silent.¹⁶

A defendant is not called upon to rebut the case made against him, until evidence has been introduced sufficient to prove the fact in issue beyond a reasonable doubt,¹⁷ and even in that case it is sufficient for him to introduce evidence which will raise a reasonable doubt of guilt.¹⁸

Facts peculiarly within knowledge of defendant.—There is an exception to the rule just stated when the subject matter of a negative averment lies peculiarly within the knowledge of the defendant. In such case the burden of proving the fact rests upon him. This rule finds frequent application in prosecutions for exercising a trade or profession or doing other acts without a license therefor. It would greatly inconvenience the prosecution to prove that the defendant had no license, whereas he can prove the fact with no inconvenience at all.¹⁹ This rule does not apply, however, where the knowledge of a person of the state of his bank account or credit is involved.²⁰

§ 149. Where Insanity or Unconsciousness is Claimed.

The burden always upon the prosecution to prove all the elements necessary to constitute the guilt of a defendant, involves proof of a mind sufficiently sane to be capable of committing crime or any degree of crime involved in the offense charged. But the law presumes all men sane, with full mental capacity to commit any crime

cases of homicide, and does not even extend to cases of assault with intent to commit murder. *People v. Gordon*, 88 Cal. 422, 26 Pac. 502.

16. *People v. Streuber*, 121 Cal. 431, 53 Pac. 918.

17. *People v. Kelly*, 28 Cal. 423; *People v. Antonio*, 27 Cal. 404.

18. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Riccardi*, 33 Cal. App. Dec. 819, 195

Pac. 448; *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039. See *infra*, § 259 et seq.

19. *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402; *People v. Goscinsky*, 34 Cal. App. Dec. 869, 198 Pac. 40; *People v. T. Wah Hing*, 32 Cal. App. Dec. 108, 190 Pac. 662. See LICENSES.

20. *People v. Frey*, 165 Cal. 140, 131 Pac. 127.

or degree of crime. This presumption is the full equivalent of proof of it as a fact, and, until the contrary is shown, the prosecution, by the presumption, has proved the sanity of the defendant beyond a reasonable doubt.¹ It then devolves upon a defendant relying upon the defense of insanity to establish it.² He must prove insanity of such a character as in point of law amounts to a defense,³ and he must do so by a preponderance of the evidence.⁴ This rule does not shift the burden of proof; it merely shifts the burden of introducing evidence and declares the quantum of evidence which he must produce to overthrow the presumption and show his insanity.⁵ The rule is the same where the defendant relies upon the defense of unconsciousness resulting from epilepsy and the like.⁶

IV. FACTS IN ISSUE AND RELEVANT TO ISSUE.

§ 150. **In General.**—It has been well said that the general tests of the admissibility of evidence in criminal cases are: 1. Is it a part of the *res gestae*? 2. If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense?⁷ In other words, is it relevant? The doctrine of *res gestae* involves the rule against the admission of hearsay evidence and is discussed in another place.⁸

1. *People v. Harris*, 169 Cal. 53, 88; *People v. Ferris*, 55 Cal. 588; 68, 145 Pac. 520. See *supra*, § 143, as to presumption of sanity.

2. *People v. Willard*, 150 Cal. 543, 522, 89 Pac. 124; *People v. Nihell*, 144 Cal. 200, 77 Pac. 916; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Bemmerly*, 98 Cal. 299, 303, 33 Pac. 263; *People v. McNulty*, 93 Cal. 427, 442, 26 Pac. 597, 29 Pac. 61; *People v. Travers*, 88 Cal. 233, 239, 26 Pac.

3. *People v. Bell*, 49 Cal. 485.

4. See *infra*, § 263.

5. *People v. Harris*, 169 Cal. 53, 68, 145 Pac. 520.

6. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916.

7. *People v. Sanders*, 114 Cal. 216, 230, 46 Pac. 153.

8. See *infra*, § 190 et seq.

With reference to the question of relevancy, it is one of the first principles of the law of evidence that testimony must be confined to the issues,⁹ which, in the case of a plea of not guilty, are two: first, that the act itself was done, or the corpus delicti; and second, that it was done by the person charged and none other.¹⁰ Much must be left to the discretion of the trial court in determining whether proffered testimony has any relevancy to the issue to be determined and whether it is such that the jury will be authorized to make any inference therefrom which will aid them in determining the issues.¹¹ While evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, is inadmissible,¹² generally speaking, an incidental fact is relevant to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue certain. It is not necessary that such incidental fact should bear directly

9. *People v. Lane*, 100 Cal. 379, 385, 34 Pac. 856; *People v. Tyler*, 36 Cal. 522; *People v. Jones*, 31 Cal. 565; *Huntington v. Superior Court*, 5 Cal. App. 288, 292, 90 Pac. 141. See *People v. Worthington*, 105 Cal. 168, 38 Pac. 689 (holding that testimony as to the effect of hypnotism upon those subject to its influence is inadmissible where there was no evidence tending to show the defendant was under the influence of hypnotism); and see EVIDENCE.

The relevancy of proffered evidence in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of the guilt of the defendant. *People*

v. Billings, 34 Cal. App. 549, 168 Pac. 396.

10. *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389; *People v. Jones*, 31 Cal. 565, quoting 3 Greenl. Ev., § 30. See *infra*, § 248, as to sufficiency of proof of corpus delicti.

11. *People v. Craig*, 111 Cal. 460, 44 Pac. 186.

12. *People v. Lynch*, 122 Cal. 501, 55 Pac. 248; *People v. Tyler*, 36 Cal. 522; *People v. Jones*, 31 Cal. 565. See *People v. Miller*, 7 Cal. Unrep. 192, 78 Pac. 227, holding that evidence as to the number of boxes of fruit a witness can pack in a given time is not admissible to show how many the defendant can pack.

upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, however small, in the chain of evidence and tends thereby to establish the existence of the main fact in issue. Hence any fact is relevant evidence which naturally tends to show the means and method employed in the commission of the crime.¹³ In this connection it may be noted that the tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury.¹⁴ In those cases in which the jury is authorized to fix the imprisonment, it is permissible to prove collateral facts for the purpose of aiding the jury in determining the degree of punishment.¹⁵

While testimony must be relevant, it does not follow that all relevant evidence is admissible, as it may be inadmissible because of some other rule of exclusion,—the rule against the admission of hearsay, for instance.¹⁶

§ 151. Intent.—When the intent of a defendant is an issue, it is competent for him to testify as to his state of mind at the time,¹⁷ and also to prove other facts from which intent may be inferred.¹⁸ It is a maxim of law, the correctness of which is said to be shown by human

13. *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 59; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396. See *infra*, § 159.

14. *People v. Mooney*, 177 Cal. 642, 655, 171 Pac. 690; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396, quoting *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380.

15. *People v. Hong Ah Duck*, 61 Cal. 387, where the fact that the

defendant was serving a term of imprisonment for life was proved.

16. See *infra*, § 182 et seq.

17. *People v. Ah Wing*, 35 Cal. App. 218, 223, 169 Pac. 402; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756. See *infra*, § 249. See EVIDENCE.

18. *People v. Eastman*, 77 Cal. 171, 19 Pac. 266. See *infra*, this section.

experience, that acts indicate intention.¹⁹ Hence the conduct of a party before and after the principal fact in issue is admissible, not as part of the *res gestae*, but as a circumstance connected with the act indicating a guilty intent.²⁰ In this connection, as bearing upon the question of intent, it is permissible to show the relation between the defendant and the victim of the crime,¹ threats made by the defendant against the victim,² the motive of the defendant,³ and also the commission of similar crimes.⁴ So, also, the intent of the defendant may be proved by the circumstances connected with the offense if they are of such a nature as to disclose the intent.⁵ Thus, in the case of a crime involving an assault, the character of the weapon used,⁶ and the nature and location of the wounds inflicted,⁷ are some evidence of a malicious intent to kill.⁸ It is provided in the Penal Code that

“The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.”⁹

Aside from intent as an element of the crime charged, it is settled that the intent, design or plan of a party to do an act is a circumstance tending to prove he did it. Such intent, design or plan may be proved by evidence of

19. *People v. Fick*, 89 Cal. 144, 151, 26 Pac. 759.

20. *People v. Fick*, 89 Cal. 144, 151, 26 Pac. 759; *People v. Welsh*, 63 Cal. 167. See *infra*, §§ 154, 157.

1. See *infra*, § 155.

2. See *infra*, § 156.

3. See *infra*, § 152.

4. See *infra*, § 169.

5. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20; *People v. Hite*, 135 Cal. 76, 67 Pac. 57; *People v. Franklin*, 31 Cal. App. Dec. 386, 188 Pac. 607. See *People v. Wells*, 145 Cal. 138, 78 Pac. 470 (pointing

a loaded pistol at another under the circumstances held to raise a presumption of unlawful intent).

6. *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779. See *infra*, § 228.

7. *People v. Grill*, 151 Cal. 592, 91 Pac. 515; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Kafoury*, 16 Cal. App. 718, 117 Pac. 938; *People v. Kerr*, 15 Cal. App. 273, 114 Pac. 584.

8. See ASSAULT AND BATTERY, vol. 3, p. 214.

9. Pen. Code, § 21.

the defendant's conduct,¹⁰ including evidence of other crimes,¹¹ as well as by declarations of state of mind made under circumstances precluding the idea of fabrication.¹²

§ 152. Motive.—While it is not indispensable that motive be proved as an element necessary to justify a conviction,¹³ the presence or absence of motive is a circumstance going to the question of the guilt or innocence,¹⁴ and proof thereof is always admissible and often valuable.¹⁵ Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory.¹⁶ Such evidence is relevant as determining the character of the act perpetrated and ascertaining the intent of the accused,¹⁷ and as solving a doubt as to the degree of the offense, to the insanity of the defendant, or to the justification or excusability of his act.¹⁸ And evidence of motive is said to be particularly material where the evidence as to the identity of the criminal is circumstantial.¹⁹

10. See *infra*, § 157.

11. See *infra*, § 174.

12. See *infra*, § 188.

13. See *supra*, § 14.

14. *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389, 394; *People v. Bauweraerts*, 164 Cal. 696, 130 Pac. 717; *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016; *People v. Owens*, 132 Cal. 469, 471, 64 Pac. 770; *People v. Brown*, 130 Cal. 591, 62 Pac. 1072; *People v. Durrant*, 116 Cal. 179, 208, 48 Pac. 75; *People v. Kern*, 61 Cal. 244; *People v. Kepford*, 35 Cal. App. Dec. 96, 199 Pac. 64; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825 (holding instruction to this effect was not erroneous); *People v. Pool*, 27 Cal. 572.

15. *People v. Rongo*, 169 Cal. 71, 75, 145 Pac. 1017; *People v. Cook*,

148 Cal. 334, 350, 83 Pac. 43, per Henshaw, J., concurring; *People v. Wright*, 144 Cal. 161, 77 Pac. 877; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Cornell*, 29 Cal. App. 430, 155 Pac. 1026.

16. *People v. Durrant*, 116 Cal. 179, 207, 10 Am. St. Rep. 499, 48 Pac. 75.

17. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Miller*, 121 Cal. 343, 53 Pac. 816; *People v. Pool*, 27 Cal. 573; *People v. Brown*, 35 Cal. App. Dec. 751, 200 Pac. 727.

18. *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Soeder*, 150 Cal. 12, 15, 87 Pac. 1016; *People v. Brown*, 130 Cal. 589, 62 Pac. 1072 (where the defendant claimed he acted in self-defense).

19. *People v. Weston*, 169 Cal.

Motive may be shown either by positive evidence or it may be gleaned from the facts and surroundings of the act.²⁰ The people may advance any motive within the range of human experience and reasonable probability,¹ and support it by any testimony which tends reasonably and fairly, according to the ordinary operation of the human mind and the ordinary principles of human conduct, to establish it.² For example, the prosecution may prove the relations existing between the defendant and the victim of an assault,³ and prior threats and expressions of ill will.⁴ So, also, it may be shown that the victim of an assault was a nonunion man and that the defendant was a member of a labor union,⁵ though evidence of this character should be limited to a general showing of the relations of the parties.⁶

Evidence tending to show motive is admissible even though it tends to show the commission of another crime,⁷ or to reflect upon the defendant discredibly.⁸

§ 153. Identity of Accused.—The identity of the defendant as the person who committed the crime may be proved by the direct testimony of the witness who saw him, as well as by circumstantial evidence tending to connect

393, 397, 146 Pac. 871; *People v. Argentos*, 156 Cal. 720, 726, 106 Pac. 65; *People v. Wright*, 144 Cal. 161, 77 Pac. 877; *People v. Miller*, 121 Cal. 343, 53 Pac. 816; *People v. William Yee*, 37 Cal. App. 579, 584, 174 Pac. 343; *People v. Simons*, 25 Cal. App. 723, 145 Pac. 145; *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369; *People v. Botkin*, 9 Cal. App. 244, 252, 98 Pac. 861; *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553.

20. *People v. Enwright*, 134 Cal. 527, 530, 66 Pac. 726; *People v. Durrant*, 116 Cal. 179, 207, 48 Pac. 75.

1. *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055.

2. *People v. Argentos*, 156 Cal. 720, 106 Pac. 65; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016.

3. See *infra*, § 155.

4. See *infra*, § 156.

5. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369.

6. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042.

7. See *infra*, § 172.

8. *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Soeder*, 150 Cal. 15, 87 Pac. 1017. See *infra*, § 177.

him with the crime. The fact that a witness is unable to identify the defendant positively but expresses a belief he was the person seen does not render his testimony inadmissible, but goes to its weight which is for the jury.⁹

As tending to connect an accused with the crime it is competent to prove an intent or plan to commit it,¹⁰ motive,¹¹ the suspicious possession of property,¹² and prior¹³ and subsequent¹⁴ conduct of the defendant, which tends to connect him with the crime or shows a consciousness of guilt. The prosecution may show that the defendant was present at or near the scene of the crime at the time of its commission,¹⁵ and may introduce evidence of footprints leading from the locus of the crime to the place where the defendant was seen,¹⁶ and of the similarity in the tracks at the scene of the crime and the defendant's shoes.¹⁷ But it is competent for the defendant to rebut such evidence by showing that the boot of someone else near by left similar marks,¹⁸ or by any legal evidence tending to contradict that offered by the prosecution.¹⁹

§ 154. Prior Conduct.—The conduct of a defendant prior to the commission of the crime charged against him, which has a direct tendency to connect him with it and

9. *People v. Young*, 102 Cal. 411, 36 Pac. 770; *People v. Rolfe*, 61 Cal. 540; *People v. Botkin*, 9 Cal. App. 244, 254, 98 Pac. 861. See *infra*, § 230, as to requiring defendant to stand up for identification.

10. See *supra*, § 151.

11. See *supra*, § 152.

12. See *infra*, § 159.

13. See *infra*, § 154.

14. See *infra*, § 157.

15. *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176; *People v. Ho Kim You*, 24 Cal. App. 451, 462, 141 Pac. 950. See, also, the particular criminal titles in this work.

16. *People v. Wood*, 145 Cal. 659, 79 Pac. 367.

17. *People v. Rowell*, 133 Cal. 39, 56 Pac. 127; *People v. Searcey*, 121 Cal. 1, 41 L. B. A. 157, 53 Pac. 359; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207 (the time when the footprints were measured goes to the weight not the admissibility of the evidence); *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868.

18. *People v. Myers*, 70 Cal. 582, 12 Pac. 719.

19. *People v. Creeks*, 141 Cal. 529, 75 Pac. 101.

to identify him as a guilty participant therein, is both relevant and material.²⁰ Thus, evidence is admissible to show that the defendant made preparation for the commission of the crime,¹ and that he endeavored to induce another to assist in the commission.² It may also be shown that the defendant was in the vicinity of the scene of the crime near the time of its commission,³ that he was seen in company with the accomplice used as a witness by the state,⁴ that prior to the commission of the crime he went by a false name,⁵ and that he was in a state of great mental excitement.⁶ Where the defendant is identified by the clothes he wore, testimony of other witnesses as to the style of clothes usually worn by him is relevant in corroboration of his identification.⁷ So also, it may be shown that the defendant attempted to purchase instruments with which to commit the crime, but the reasons of the dealer in refusing to sell them are irrelevant.⁸

The prior conduct of the defendant may also be relevant to the question of intent, after he has been identified

20. *People v. Linares*, 142 Cal. 17, 75 Pac. 308 (where, on a prosecution for robbery, the discovery by the defendant that the victim had money, his comment thereon, and an assault and battery prior to the final assault were proved); *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049; *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457 (that the defendant left the house immediately after the victim of the crime is a circumstance tending to show the defendant could have committed the assault).

1. *People v. Oldham*, 111 Cal. 648, 44 Pac. 312.

2. *People v. Winthrop*, 118 Cal. 85, 50 Pac. 85.

Statements of defendant before the crime offering a third person an opportunity to make money are admissible on the question of preparation, *People v. Herman*, 33 Cal. App. Dec. 362, 193 Pac. 868. See *infra*, § 194.

3. *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049; *People v. Rolfe*, 61 Cal. 540.

4. *People v. Rolfe*, 61 Cal. 540.

5. *People v. Kelly*, 146 Cal. 119, 79 Pac. 846. Compare § 169, *infra*.

6. *People v. Weston*, 169 Cal. 393, 146 Pac. 871.

7. *People v. Weber*, 149 Cal. 325, 337, 146 Pac. 871.

8. *People v. Oldham*, 111 Cal. 648, 44 Pac. 312.

as the criminal. Thus the preparation of the defendant,⁹ prior attempts to commit the crime,¹⁰ and the previous commission of similar crimes,¹¹ may be shown as tending to prove the intention of the defendant in committing the crime charged. So, also, evidence of a conspiracy to commit a crime is competent for the purpose of showing the intent with which the defendant in furtherance thereof committed the crime charged against him.¹² The prosecution cannot, however, introduce evidence of acts of immoral conduct which have no tendency to prove the issues in the case and are designed merely to degrade and prejudice the defendant.¹³

The conduct of a defendant upon a different occasion has no tendency to disprove the crime charged against him and cannot be shown in his behalf,¹⁴ though evidence as to his good character in the community for the trait involved in the charge is relevant and may be proved.¹⁵

§ 155. Relation of Parties.—Upon prosecution for a crime involving an assault, evidence of the relations between the defendant and the victim is relevant to show malice and motive.¹⁶ Accordingly, to indicate the state of mind of the defendant at the time of the assault, the prosecution is always entitled to show any previous difficulties or troubles that have arisen between the parties,¹⁷

9. *People v. Cuff*, 122 Cal. 589, 55 Pac. 407.

10. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596 (where a prior assault upon the victim was shown); *People v. Zimmerman*, 3 Cal. App. 84, 84 Pac. 446.

11. See *infra*, § 169.

12. *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *People v. Geiger*, 49 Cal. 643.

13. See *infra*, § 167.

14. *People v. Bend*, 13 Cal. App. 175, 191, 109 Pac. 150.

15. See *infra*, § 163.

16. *People v. Kern*, 61 Cal. 244.

17. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539; *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403, 42 Pac. 307 (distinguished in *People v. Thomson*, 145 Cal. 717, 79 Pac. 435); *People v. Thomson*, 92 Cal. 506, 512, 28 Pac. 589; *People v. Kern*, 61 Cal. 244; *People v. Wilson*, 23 Cal. App. 513, 521, 138 Pac. 971; *People v. Piercy*, 16 Cal. App. 13, 116 Pac. 322; *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111.

even though they may have occurred some considerable time prior to the commission of the crime charged;¹⁸ and this showing is not limited to physical encounters, but may consist solely in an affray of words.¹⁹ These matters may be shown in a general way, but it is not proper to enter into an examination of them in detail for the purpose of determining which of the parties was in the wrong.²⁰

The relation between the defendant and other persons may be proved when it tends to show a motive for the crime, and when evidence of motive is relevant.¹ While evidence of difficulties between the defendant and third persons which does not tend to show any ill feeling between the defendant and the victim of the crime is inadmissible for that purpose,² such evidence should not be excluded if there is a sufficient connection with the injury inflicted.³

§ 156. Threats and Expressions of Ill Will.—Threats by an accused against a person assaulted⁴ and statements

18. *People v. Brown*, 76 Cal. 573, 118 Pac. 678.

19. *People v. Colvin*, 118 Cal. 349, 50 Pac. 539. See *ASSAULT AND BATTERY*, vol. 3, p. 214.

20. *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Thomson*, 92 Cal. 506, 512, 28 Pac. 589.

1. *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Wright*, 144 Cal. 161, 77 Pac. 877; *People v. Brown*, 130 Cal. 591, 594, 62 Pac. 1072 (intimate relations between the defendant and the deceased's wife may be shown). See *People v. Gress*, 107 Cal. 461, 40 Pac. 752, holding the evidence

irrelevant where the killing was admitted and the only issue was whether it was in necessary self-defense. See *infra*, § 172.

2. *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698; *People v. Clark*, 84 Cal. 573, 581, 24 Pac. 313. See *infra*, § 156.

3. *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Miller*, 121 Cal. 343, 53 Pac. 816; *People v. Stonecipher*, 6 Cal. 405 (admissible to prove conspiracy). See *HOMECIDE*.

4. *People v. Wood*, 145 Cal. 659, 79 Pac. 367; *People v. Fitzgerald*, 138 Cal. 39, 45, 70 Pac. 1014; *People v. Chaves*, 122 Cal. 134, 54 Pac. 596; *People v. Dice*, 120 Cal. 189, 200, 52 Pac. 477 (the failure of the

expressing hostility towards him⁵ tend to show intent, malice and motive and to increase the probabilities that the person making them committed the offense, and therefore are admissible against him, regardless of the lapse of time intervening between the threat and the assault.⁶ But evidence of threats against others is inadmissible unless there are circumstances which show some connection between the facts sought to be proved and the particular act under investigation.⁷ The mere fact that a threat against the victim includes a threat against other persons does not render it inadmissible.⁸ And mere indefiniteness is not a sufficient reason for excluding the evidence if the threat is broad enough to include the victim and the subsequent facts show with reasonable probability who is referred to.⁹ A threat made by a de-

witness to remember the remainder of the conversation does not require his testimony to be stricken out; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. Hecker*, 109 Cal. 451, 458, 30 L. E. A. 403, 42 Pac. 307; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782; *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Scoggins*, 37 Cal. 676, 699 (per Sanderson, J., concurring and dissenting); *People v. Taylor*, 36 Cal. 255, 263; *People v. Cronin*, 34 Cal. 191, 205; *People v. Evans*, 5 Cal. Unrep. 125, 41 Pac. 444; *People v. Khair Din*, 39 Cal. App. 695, 179 Pac. 713; *People v. Rader*, 24 Cal. App. 477, 141 Pac. 958. See HOMICIDE, as to evidence of threats by the deceased.

5. *People v. Barthleman*, 120 Cal. 7, 14, 52 Pac. 112. See *supra*, § 155.

6. *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Cronin*, 34 Cal. 191.

7. *People v. Wilt*, 173 Cal. 477, 160 Pac. 561; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Powell*, 87 Cal. 348, 362, 11 L. E. A. 75, 25 Pac. 481; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643. See, also, *People v. Lynch*, 122 Cal. 501, 55 Pac. 248, holding a declaration of an intention to commit a distinct offense is inadmissible. See *supra*, § 155.

8. *People v. Rulia Singh*, 182 Cal. 457, 479, 188 Pac. 987, 996; *People v. Suesser*, 142 Cal. 354, 363, 75 Pac. 1093; *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111.

9. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9 (a declaration of a defendant when hiring a vehicle of an intention to go to a place to have carnal knowledge of "a little girl" is admissible in a rape case though the name of the girl is not given); *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. Pia*, 14 Cal. App. 131, 111 Pac. 105 (a declaration of in-

fendant to injure his agent in the commission of the crime should he fail to do as directed is admissible to show the defendant's guilty participation in the crime, notwithstanding the tendency of such evidence is to prejudice him in the eyes of the jury.¹⁰

The trial court has a large discretion in allowing proof of the circumstances under which the threat was made. But enough of the circumstances must always be given to enable the jury to understand the purport of the threat and the purpose of the defendant in making it.¹¹

§ 157. Subsequent Conduct—Explanation of.—Any conduct of a defendant subsequent to the commission of the crime with which he is charged which indicates a consciousness of guilt is relevant and admissible against him.¹² It is elementary that efforts to manufacture testimony,¹³ or to suppress testimony against himself,¹⁴ are properly proved as indicating a consciousness of guilt. Thus it may be shown that the defendant made false statements for the purpose of misleading or warding off suspicion,¹⁵ or that he tried to dissuade a witness from prosecuting him,¹⁶ or that he attempted to intimidate witnesses whom he expected to testify against him,¹⁷ or to induce them to leave the jurisdiction of the court.¹⁸

tention to rape a "girl who works for the 'Marin Journal'" is admissible in connection with other testimony tending to show who was meant).

10. *People v. Martin*, 19 Cal. App. 295, 125 Pac. 919.

11. *People v. Fowler*, 178 Cal. 657, 666, 174 Pac. 892.

12. *People v. Jones*, 160 Cal. 358, 366, 117 Pac. 176; *People v. Sprague*, 35 Cal. App. Dec. 13, 198 Pac. 820.

13. *People v. Burke*, 18 Cal. App. 72, 98, 122 Pac. 435.

14. *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318.

15. *People v. Moran*, 144 Cal. 48,

60, 77 Pac. 777; *People v. Cole*, 141 Cal. 88, 74 Pac. 547; *People v. Peete*, 36 Cal. App. Dec. 201, 202 Pac. 51; *People v. Johnson*, 34 Cal. App. Dec. 557, 197 Pac. 135. See *infra*, § 196.

16. *People v. Mack*, 14 Cal. App. 12, 110 Pac. 967.

17. *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697 (the fact that the defendant was in custody at the time is immaterial).

18. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *People v. Burke*, 18 Cal. App. 72, 98, 122 Pac. 435.

Proof that the person approaching the witness was acting on be-

Also it may be shown that the defendant fled from the scene of the crime,¹⁹ or endeavored to conceal himself,²⁰ or that he offered arresting officers a bribe if they would release him,¹ or that he disguised himself and assumed a false name for the purpose of concealing his identity.² In like manner, evidence is relevant to show any unnaturalness of the defendant's demeanor after the commission of the crime,³ or to show any conduct of the defendant when charged with the commission of the crime,⁴ or when arrested,⁵ or when confronted by persons whom he knew to be aware of the part he took,⁶ which is such as an innocent man could not be likely to exhibit.

As evidence of intent.—When the conduct of the defendant subsequent to the commission of the crime charged tends to show his prior intent, it is relevant for this purpose also.⁷ Concealment of a criminal act, for example, tends to a greater or less extent to prove the willfulness of the act as well as the criminal purpose with which it was done.⁸ So, also, the act of the defendant in making statements tending to show malice toward the victim of his assault,⁹ or in following him and threatening him again,¹⁰ is admissible as tending to prove prior intent.

half of the defendant may be made by circumstantial evidence. *People v. Burke*, 18 Cal. App. 72, 91, 122 Pac. 435.

19. See *infra*, § 158.

20. *People v. Ah Wing*, 35 Cal. App. 218, 169 Pac. 402.

1. *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59.

2. *People v. Winthrop*, 118 Cal. 85, 91, 50 Pac. 390; *People v. Cox*, 29 Cal. App. 419, 155 Pac. 1010.

3. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Leung Ock*, 141 Cal. 323, 74 Pac. 986; *People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520.

4. *People v. Cole*, 141 Cal. 88, 74 Pac. 547; *People v. Rowell*, 133 Cal. 39, 65 Pac. 127. See *infra*, § 196.

5. *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Abbott*, 2 Cal. Unrep. 383, 4 Pac. 769.

6. *People v. Sprague*, 35 Cal. App. Dec. 13, 198 Pac. 820.

7. See *supra*, § 151.

8. *People v. Tomalty*, 14 Cal. App. 224, 235, 111 Pac. 513.

9. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *People v. Shears*, 133 Cal. 154, 65 Pac. 295.

10. *People v. Yslas*, 27 Cal. 630.

Explanation of conduct.—When the prosecution proves conduct of an accused which tends to show a consciousness of guilt, the accused may show all the facts explaining his conduct.¹¹ When, for example, evidence of flight is introduced by the prosecution, the defendant has a clear right to explain his action,¹² but he cannot do so until the prosecution has introduced evidence of flight.¹³

§ 158. Flight, Escape and Refusal to Flee.—The flight of a person after the commission of a crime, while not of itself sufficient to establish guilt,¹⁴ or to raise a presumption of guilt,¹⁵ is a circumstance which is to be considered by the jury in connection with all the other facts and circumstances in the case as tending in some degree to prove a consciousness of guilt.¹⁶ Consequently, evidence thereof is admissible, not as part of the *res gestae*, but as indicative of a guilty mind.¹⁷ Since, however, the mere de-

11. *People v. Cuff*, 122 Cal. 589, 594, 55 Pac. 407; *People v. Hadgdon*, 55 Cal. 72, 36 Am. Rep. 30; *People v. Williams*, 17 Cal. 142 (the defendant may show why he was armed).

12. *People v. Sainz*, 162 Cal. 242 121 Pac. 922 (the defendant may show that he feared mob violence). *People v. Easton*, 148 Cal. 50, 82 Pac. 840. See *infra*, § 158.

13. *People v. Clark*, 84 Cal. 573, 580. And see *People v. Shaw*, 111 Cal. 171, 24 Pac. 313.

14. *People v. Gee Gong*, 15 Cal. App. 28, 114 Pac. 78, 81.

15. *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *People v. Gee Gong*, 15 Cal. App. 28, 114 Pac. 78, 81.

16. *People v. Fowler*, 178 Cal. 657, 673, 174 Pac. 892 (holding an instruction that flight does not tend to prove deliberation or premedita-

tion in the killing was erroneous and properly refused); *People v. Giancoli*, 74 Cal. 642, 16 Pac. 510; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688 (instruction held correct); *People v. Gee Gong*, 15 Cal. App. 28, 114 Pac. 78, 81; *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951 (instruction embodying rule held correct).

17. *People v. Sainz*, 162 Cal. 242, 121 Pac. 922; *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *People v. Ashmead*, 118 Cal. 507, 50 Pac. 681; *People v. Welsh*, 63 Cal. 167, 50 Pac. 681; *People v. Lock Wing*, 61 Cal. 380; *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868 (the flight of defendant and companion may be shown); *People v. Brecker*, 20 Cal. App. 205, 216, 127 Pac. 666. See *infra*, § 212, as to evidence of flight of co-conspirator.

parture from the vicinity of the alleged crime would have no logical tendency to prove guilt, if the defendant at the time of leaving did not know that a crime had been committed, evidence of flight should be considered by the jury only when there is other evidence showing such knowledge on the part of the defendant.¹⁸ It is also stated in several cases that such evidence cannot be considered unless there is also a showing that he knew, when he fled, that he was charged with the crime.¹⁹ But it would seem that this cannot be correct, because immediate flight, in the absence of any accusation—in advance, perhaps of the possibility of an accusation, formal or informal—may afford very persuasive evidence of a consciousness of guilt.²⁰

In proving the flight of the defendant it is competent to prove a search for him,¹ his pursuit and capture,² including his resistance to arrest when overtaken, even though it amounts to the commission of another crime.³ The disposition made by the defendant of the instruments of the crime is provable also as tending to show flight.⁴ The escape of the defendant after arrest,⁵ or an attempt to escape,⁶ after being informed of the cause of his arrest, is a circumstance tending to show his guilt and is admis-

18. *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917; *People v. Brecker*, 20 Cal. App. 205, 216, 127 Pac. 666.

19. *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917, per Lorigan, J., Melvin, J., and Henshaw, J. (Sloss, J., Angellotti, J., and Shaw, J., dissenting); *People v. Sainz*, 162 Cal. 242, 121 Pac. 922; *People v. Jones*, 160 Cal. 358, 117 Pac. 176.

20. *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917, per Sloss, J. (Angellotti, J., and Shaw, J., concurring).

1. *People v. Fine*, 77 Cal. 147, 19 Pac. 269.

2. *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944.

3. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65. See *infra*, § 168.

4. *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101.

5. *People v. Welsh*, 63 Cal. 167; *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65.

6. *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Strong*, 46 Cal. 302; *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493.

sible for that purpose, even though it tends to prove the commission of another crime.⁷ The fact that the arrest was made without a warrant is immaterial, as this does not justify an escape.⁸ So also a letter written by the defendant containing declarations of an attempt to escape, if possible, is admissible, though no such attempt was actually made.⁹

As evidence for accused.—While the flight of a defendant tends to establish his guilt, it by no means follows that a failure to flee, having the opportunity to do so, tends to prove innocence. Consequently, such evidence is inadmissible on the defendant's behalf.¹⁰ It has been suggested, however, that evidence of an intent to surrender himself and dissuasion therefrom by others may well be allowed.¹¹ The right of the accused to explain his flight is considered in the preceding section.

§ 159. Possession of Property and Financial Condition.

The possession of the fruits of a crime tends to connect one with its commission and may be shown against him.¹² Accordingly, while evidence of the wealth or poverty of a defendant is generally inadmissible, the sudden possession of money, immediately after the commission of a crime, by one who before that time was impecunious, is clearly admissible as a circumstance in the case.¹³ So

7. See *infra*, § 168.

8. *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493.

9. *People v. Schafer*, 161 Cal. 573, 119 Pac. 920.

10. *People v. Montgomery*, 53 Cal. 576, cited in *People v. Herrera*, 32 Cal. App. 610, 614, 163 Pac. 879. See *infra*, § 159, evidence of nonpossession of tools.

11. *People v. Shaw*, 111 Cal. 171, 176, 43 Pac. 593.

12. *People v. Sears*, 119 Cal. 267, 51 Pac. 325 (ownership of trunk

containing stolen property may be shown); *People v. Castile*, 3 Cal. App. 487, 86 Pac. 746; *People v. Castile*, 3 Cal. App. 485, 86 Pac. 745. See BURGLARY, vol. 4, p. 741, and LARCENY, as to evidence of possession of stolen property.

13. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863 (not deciding whether a foundation for the evidence must be laid by showing that the defendant was impecunious before the commission of the crime); *People v. Leung Ock*, 141

also, although evidence of the possession of tools or weapons not connected with the offense charged is irrelevant,¹⁴ it may be proved that shortly after the commission of the crime, the defendant was in possession of the means to commit it in the manner in which it was committed.¹⁵ But while it is true that the possession of tools is a circumstance against an accused, it cannot be said that nonpossession tends to prove innocence. A defendant cannot, therefore, prove that no tools were found in his room when searched.¹⁶

The defendant may rebut evidence of sudden possession of money by evidence accounting for its possession. But evidence of his ability to borrow money has no such tendency.¹⁷

§ 160. Miscellaneous.—Evidence of the condition in which an accomplice was found after the crime is admissible against the defendant after evidence tending to connect him with the accomplice.¹⁸ But the absence of associates of the defendant cannot be shown where it is not claimed that he was responsible for their absence.¹⁹

Cal. 323, 74 Pac. 986 (possession of money after homicide); *People v. Kelly*, 132 Cal. 430, 64 Pac. 563 (possession of money after larceny); *People v. Peltin*, 1 Cal. App. 612, 82 Pac. 980 (prosecution for grand larceny). See *infra*, § 226.

14. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862 (the possession of a pistol later in the day cannot be shown where it is not claimed to be the pistol with which the crime was committed); *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297; *People v. Yee Fook Din*, 106 Cal. 163, 39 Pac. 530 (that defendant carried concealed weapons a month after the crime cannot be proved); *People v. Wong Ah Leong*, 99 Cal. 440, 34 Pac. 105 (upon a prosecu-

tion for assault with a knife, proof that the defendant when arrested had a pistol is erroneous).

15. *People v. Mooney*, 177 Cal. 642, 171 Pac. 690; *People v. Bishop*, 134 Cal. 682, 66 Pac. 976; *People v. McDowell*, 64 Cal. 467, 3 Pac. 124; *People v. Winters*, 29 Cal. 658; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396. See *infra*, § 228.

16. *People v. Lowrie*, 4 Cal. App. 137, 87 Pac. 253. See *supra*, § 158, evidence of failure to flee.

17. *People v. Peltin*, 1 Cal. App. 612, 82 Pac. 980.

18. *People v. Ward*, 77 Cal. 113, 19 Pac. 373.

19. *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719.

Nor is evidence that an alleged accomplice was found apparently in hiding competent to disprove alibi when his whereabouts does not tend to establish the presence of the defendant at the scene of the crime.²⁰ So also proof of the conviction of another person associated with the defendant in the commission of the crime is *res inter alios acta* and is not admissible as evidence of the guilt of the defendant, or for any purpose.¹

Evidence as to the conduct of third persons in attempting to have the prosecution dismissed,² or in suppressing testimony,³ is inadmissible against a defendant where such conduct did not occur in his presence and was not authorized by him.⁴ And evidence that the defendant was discharged from employment or removed from office because of the crime charged is clearly inadmissible.⁵

The prosecution may account for the absence of any witness to the commission of the crime.⁶

Time of commission of crime.—Circumstances which in connection with other evidence tend to show the time of the commission of the offenses charged are relevant,⁷ as are the circumstances by which a witness fixes the date.⁸ Accordingly, the preliminary complaint is admissible for this purpose when the prosecuting witness testifies that the crime occurred the day prior to the making and filing of the complaint.⁹ It is not necessary that the time of the commission of the offense be proved by the witness who testifies to the facts.¹⁰

20. *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719.

1. *People v. Bearss*, 10 Cal. 68.

2. *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379.

3. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504.

4. *People v. Burke*, 18 Cal. App. 72, 91, 122 Pac. 435 (evidence of authority of agent held to be sufficiently shown to authorize evidence of his acts).

5. *People v. Senegram*, 27 Cal. App. 301, 149 Pac. 786.

6. *People v. Clark*, 106 Cal. 32, 38, 39 Pac. 53.

7. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965.

8. *People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080.

9. *People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080.

10. *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457.

§ 161. Claims or Defenses of Accused.—As in civil actions, a defendant in a criminal case may interpose inconsistent defenses or claims if he choose to take that course. He may, for example, claim an alibi, and also introduce evidence tending to reduce the degree of the crime.¹¹ When an alibi is relied upon by a defendant, very large latitude is generally allowed him in explanation of conduct which might otherwise be interpreted as indicating a consciousness of guilt.¹² As evidence of where he was, the defendant may testify to various acts which he claims to have done at or about the time of the alleged offense,¹³ and any circumstances tending to fix the time.¹⁴ He is not confined to testimony as to his whereabouts on the precise day the crime was committed, if it tends to show his whereabouts at the time of the commission of the crime.¹⁵ He may offer evidence of declarations as to his intention made on leaving his home, when it is reasonably certain the statement was not the result of pre-meditated design to prepare a statement of the fact.¹⁶ But he cannot detail the particular conversation he had with persons he met, because they are self-serving declarations, not a part of the *res gestae*.¹⁷

Commission of crime by another.—While the mere arrest of another person upon suspicion of having committed the crime has no tendency to prove the defendant's innocence and is inadmissible in his behalf,¹⁸ it is competent for an accused to show that some person other than

11. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457.

12. *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951.

13. *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500.

14. *People v. McCrea*, 32 Cal. 98.

15. Neither is the prosecution in rebuttal confined to evidence of defendant's whereabouts on the day

of the crime. *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

16. See *infra*, § 188.

17. *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500; *People v. Burke*, 18 Cal. App. 72, 100, 122 Pac. 435. See *infra*, § 198.

18. *People v. Ung Sing*, 171 Cal. 83, 87, 151 Pac. 1145; *People v. Gray*, 148 Cal. 507, 83 Pac. 707.

himself committed the crime with which he is charged,¹⁹ unless, as in the case where the crime charged can as well be committed by several persons, such proof does not tend to establish his innocence.²⁰ The fact that such person had been tried and acquitted does not alter the case.¹ The prosecution may rebut evidence of this character by testimony of such other person that he was innocent of the crime,² but it cannot introduce the judgment of acquittal.³

Intoxication.—Where a specific intent is an ingredient of the offense charged, evidence as to voluntary intoxication is admissible.⁴ Since, however, there is no presumption of continuance of delirium tremens, evidence of prior attacks of delirium tremens would not tend to prove the existence of a paroxysm of the disorder at the time of the commission of the crime, and it is not reversible error to exclude such evidence.⁵ Moreover, the defendant, if normally sane, would not be relieved from responsibility even if he were suffering from such disorder as a result of his own voluntary act.⁶

§ 162. *Insanity.*—When insanity at the time of the commission of the crime charged is set up by way of defense, reasonable latitude in all inquiries relating thereto should be allowed.⁷ Evidence of insanity before or after

19. *People v. Wong Loung*, 159 Cal. 520, 532, 114 Pac. 829; *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698; *People v. Myers*, 70 Cal. 582, 12 Pac. 719. See *People v. Richaud*, 39 Cal. App. 778, 180 Pac. 50, not deciding whether evidence of the flight of another is admissible, but that the exclusion of the evidence was harmless under the circumstances. See *infra*, § 185.

20. *People v. Flood*, 41 Cal. App. 373, 378, 182 Pac. 766.

1. *People v. Mitchell*, 100 Cal. 328, 333, 34 Pac. 698.

2. *People v. Clarke*, 130 Cal. 642, 646, 63 Pac. 138; *People v. Van Horn*, 119 Cal. 323, 328, 51 Pac. 538.

3. *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698.

4. *People v. Conte*, 17 Cal. App. 773, 122 Pac. 450, 457, by supreme court in denying a rehearing. See *supra*, § 26.

5. *People v. Bremer*, 24 Cal. App. 315, 141 Pac. 222.

6. See *supra*, § 25.

7. Evidence that defendant's mother suffered inconvenience and

the time of the crime charged,⁸ including insanity at the time of the trial,⁹ has a tendency to prove insanity at the time of the commission of the crime charged. It is therefore competent to prove the acts, conduct and declarations of the defendant, not only at the time of,¹⁰ but also within a reasonable time before and after, the commission of the alleged criminal act,¹¹ if they appear to have any tendency to show his mental condition when the crime was committed.¹² While from the nature of the case no fixed rules can be established as to the period of time over which an inquiry of this character should be extended¹³ and much must be left to the discretion of the trial court,¹⁴ a wider range on the score of time should be allowed to the testimony where the insanity sought to be proved is of a temporary character or interrupted by lucid intervals, than where it is of a more continuous and permanent nature.¹⁵

pain while he was en ventre se mere, and that the physician had difficulty in causing defendant to breathe at birth is competent on the issue of sanity. *People v. Harris*, 169 Cal. 59, 62, 154 Pac. 520.

8. *People v. Farrell*, 31 Cal. 576; *People v. March*, 6 Cal. 543, 547.

9. *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Farrell*, 31 Cal. 576; *People v. Kirby*, 15 Cal. App. 265, 271, 114 Pac. 794. See *People v. Flores*, 34 Cal. App. 393, 167 Pac. 413, holding an instruction directing the jury's attention to the appearance of the defendant not erroneous, though the defendant did not testify, where the defendant's counsel in at least one instance referred to his appearance.

10. *People v. Fallon*, 149 Cal. 287, 86 Pac. 689.

11. *People v. Harris*, 169 Cal. 53, 63, 145 Pac. 520; *People v. Oppen-*

heimer, 156 Cal. 733, 106 Pac. 74 (subsequent acts are admissible); *People v. Willard*, 150 Cal. 544, 550, 89 Pac. 124; *People v. Zeigler*, 142 Cal. 337, 75 Pac. 1090; *People v. Manogian*, 141 Cal. 592, 75 Pac. 177 (the acts of the defendant between the time of an injury to his head and the date of the crime may be shown); *People v. Ellsworth*, 127 Cal. 595, 60 Pac. 161; *People v. Lee Fook*, 85 Cal. 300, 24 Pac. 654.

12. The defendant's lack of success in perfecting ideas contemplated in his inventions has no tendency to show insanity, *People v. Harris*, 169 Cal. 53, 62, 145 Pac. 520.

13. *People v. Farrell*, 31 Cal. 576.

14. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Brent*, 11 Cal. App. 674, 106 Pac. 110.

15. *People v. Farrell*, 31 Cal. 576.

As tending to prove insanity, it is permissible to show the absence of all motive for the crime,¹⁶ an attempt of the defendant to commit suicide,¹⁷ and a fear of the defendant for his life which partakes of the character of a delusion.¹⁸ It may be shown that the defendant was weak-minded, as such evidence might show a predisposition to certain species of mental disease.¹⁹ The conduct of the defendant while in prison is competent as tending to prove sanity or insanity.²⁰ So also confinement of the defendant in a strait-jacket prior to the crime might tend to show insanity at the time but subsequent confinement would have no such tendency. And evidence of nonexpert prison authorities that other persons confined in incorrigible cells had become insane while so confined is irrelevant.¹ Insanity is not to be proven by general reputation for insanity, nor by the manner in which a defendant was treated by his family, as they may have been mistaken as to his condition.²

The declarations of a defendant are competent evidence of his sanity and may be considered by the jury for that purpose. But if the jury, from such evidence and such other evidence of insanity as may be introduced, find the defendant to have been insane at the time of the crime, incriminating admissions should be disregarded as a circumstance tending to convict.³ Under this rule a petition of the defendant for a writ of habeas corpus for

16. *People v. Smith*, 31 Cal. 466; *People v. Metz*, 2 Lab. (U. S. Dist. Ct.), 137. Likewise the prosecution may in rebuttal prove a motive for the crime and that the defendant's acts were inspired thereby. *People v. Donlan*, 135 Cal. 489, 67 Pac. 761.

17. *People v. Owens*, 123 Cal. 482, 489, 56 Pac. 251.

18. *People v. Ellsworth*, 127 Cal. 595, 60 Pac. 161.

19. *People v. Worthington*, 105

Cal. 166, 38 Pac. 689. But see *People v. Davis*, 4 Cal. Unrep. 524, 36 Pac. 96, holding that evidence of weakmindedness not amounting to insanity or lunacy is irrelevant.

20. *People v. McCarthy*, 115 Cal. 255, 260, 46 Pac. 1073.

1. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74.

2. *People v. Pico*, 62 Cal. 50.

3. *People v. Fallon*, 149 Cal. 287, 86 Pac. 689; *People v. Wreden*, 59 Cal. 396.

discharge from an insane asylum made shortly after the commission of the crime and containing statements as to his restoration to sanity is admissible in evidence, as well as his testimony taken on the hearing,⁴ but the affidavits, reports of examining physicians and their certificates upon commitment of defendant for insanity are inadmissible hearsay.⁵ Upon the other hand, however, a verdict upon a separate trial of insanity is competent evidence upon the question whether the defendant was insane at the time of the commission of the offense charged.⁶

Insanity of relatives.—Evidence of the insanity of the relatives of the defendant is admissible to prove his personal insanity.⁷ But evidence of this character is admissible only if there is some evidence in the case at the time tending to prove the personal insanity in dispute. There is sufficient proof to authorize such evidence, however, where it is shown that the crime is not only without motive but opposed to every motive likely, under the circumstances, to influence the conduct of a defendant as a rational being.⁸

V. CHARACTER OR REPUTATION.

§ 163. In General.—If, in a criminal prosecution, there is a question at the trial whether the defendant committed the act charged, evidence of his previous good reputation, in respect to the particular trait involved in the inquiry, is admissible for the defense,⁹ for the purpose of inducing the jury to believe, from the improbability that a

4. *People v. Willard*, 150 Cal. 543, 549, 89 Pac. 124. See note, 7 A. L. R. 583, 605, 606, as to admissibility and probative force, on issue of mental condition of accused, of prior adjudication of insanity or confinement in insane asylum.

5. See *infra*, § 185.

6. *People v. Farrell*, 31 Cal. 576.

7. *People v. Harris*, 169 Cal. 53, 145 Pac. 520.

8. *People v. Smith*, 31 Cal. 466.

9. *People v. Miller*, 114 Cal. 10, 13, 45 Pac. 986; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643; *People v. Casey*, 53 Cal. 360; *People v. Ashe*, 44 Cal. 288.

The court cannot exclude evidence of good character on the

person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution.¹⁰ Such testimony is, in its nature, of a hearsay species, being based upon what the people of the community generally say of the accused, taken out of the rule of exclusion as to such testimony, however, because of the jealous consideration which the law has for the rights of a citizen when his life or liberty is at stake. As a rule, however, such testimony is of value only where the evidence for the prosecution is circumstantial in nature.¹¹

While a defendant may introduce evidence of his good character, ordinarily the prosecution cannot introduce evidence of the defendant's bad character, except in rebuttal of evidence of good character introduced by the defendant; in other words, unless the defendant first puts his character in issue by introducing evidence of his good character.¹² This rule has no application where the defendant offers himself as a witness, for he then puts in issue his character for truth, honesty and integrity, and thereby subjects himself as a witness to the same rules for testing his credibility by impeachment or otherwise as any other witness.¹³

The right to inquire into the character of witnesses¹⁴ and of the victim of a homicide¹⁵ is elsewhere treated.

ground that the case is not doubtful, as this is a question for the jury. *People v. Swift*, 28 Cal. 397, overruling *People v. Lombard*, 17 Cal. 317; *People v. Josephs*, 7 Cal. 129.

10. *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372; *People v. Shepardson*, 49 Cal. 629.

11. *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372.

12. *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (such evidence is properly admitted in rebuttal);

People v. Gleason, 122 Cal. 370, 55 Pac. 123; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Fair*, 43 Cal. 137, 149; *People v. Rippe*, 32 Cal. App. 514, 163 Pac. 506; *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111.

13. *People v. Arnold*, 116 Cal. 682, 48 Pac. 803; *People v. Hickman*, 113 Cal. 82, 45 Pac. 175; *People v. Rippe*, 32 Cal. App. 515, 163 Pac. 506. See WITNESSES.

14. See WITNESSES.

15. See HOMICIDE.

§ 164. Scope of Inquiry.—Evidence of the character of a defendant, whether presented by the defendant or the prosecution, must be confined to his general reputation,¹⁶ previous to the commission of the crime charged,¹⁷ in the community or communities in which the defendant has lived.¹⁸ A character witness, whether put upon the stand to attack or defend character, will not be permitted, on the examination in chief, to testify to particular facts either favorable or unfavorable to the defendant,¹⁹ or to his individual opinion as to the defendant's disposition founded upon his own experience and observation.²⁰ The rule is no different when insanity is a defense than when any other defense is interposed.¹ Under this rule the good conduct of the defendant while in prison cannot be proved.² Furthermore, the evidence of good character must relate to the trait involved in the offense charged. Incidental and remote traits of character cannot be inquired into.³ For example, upon a charge of homicide or

16. *People v. Harris*, 169 Cal. 53, 64, 145 Pac. 520; *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

In the examination of witnesses as to their knowledge of the defendant's reputation, the word "general" ought always to be employed (*People v. Bush*, 68 Cal. 623, 10 Pac. 169); but an omission thereof is immaterial where the whole manner of inquiry and the character of the questions asked evince to the witness and jury that it is the general reputation that is sought. *People v. Heckman*, 113 Cal. 80, 87, 45 Pac. 175.

17. *People v. McSweeney*, 4 Cal. Unrep. 924, 38 Pac. 743; *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124.

18. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709; *People v. Klempke*, 19 Cal. App. 673, 127 Pac. 653.

19. *People v. Gordan*, 103 Cal. 568, 37 Pac. 534; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643. See WITNESSES, as to extent of cross-examination.

20. *People v. Gordan*, 103 Cal. 568, 37 Pac. 534; *People v. Ah Lee Doon*, 97 Cal. 171, 179, 31 Pac. 933.

1. *People v. Harris*, 169 Cal. 53, 64, 145 Pac. 520.

2. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

3. *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *People v. Fair*, 43 Cal. 137, 148; *People v. Josephs*, 7 Cal. 129; *People v. Burke*, 18 Cal. App. 72, 97, 122 Pac. 435; *People v. Martin*, 33 Cal. App. Dec. 557, 194 Pac. 522 (in a prosecution for attempting to corrupt a jury, the issue is honesty and integrity, rather than truthfulness, yet in view of the close line of cleavage

assault, it would be irrelevant to inquire into the character of the defendants for chastity or honesty.⁴ So also, unless the defendant is a witness in his own behalf and his reputation for truth and veracity is impeached, he cannot prove that his reputation for truth and veracity is good.⁵

§ 165. Competency of Witnesses and Testimony.—A witness who did not live in the community where the defendant lived or who does not know his reputation there, is not qualified as a character witness.⁶ A character witness is not qualified who testifies from personal knowledge only and not from reputation.⁷ Nor is one so qualified who acquires his knowledge of the defendant's previous reputation subsequent to his arrest.⁸ But the mere fact that a witness, who testifies that he knows the defendant's reputation, states that he has not heard it discussed does not render his testimony incompetent. Indeed, the absence of discussion is cogent evidence of defendant's good character, because such discussion seldom occurs until after some breach of the law.⁹ Written declarations, official or otherwise, made by third persons out of court are not admissible upon the general issue of character, however.¹⁰

between characteristics of honesty and truth, the court may well allow evidence as to defendant's reputation for truth also).

4. *People v. Cowgill*, 93 Cal. 597, 29 Pac. 228; *People v. Fair*, 43 Cal. 137; *People v. Davis*, 1 Cal. App. 8, 13, 81 Pac. 716.

5. *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *People v. Barkdoll*, 36 Cal. App. 25, 171 Pac. 440.

6. *People v. Maiser*, 70 Cal. 98, 11 Pac. 503; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *People v. Moan*, 65 Cal. 532, 4 Pac. 545; *People v. McSweeney*, 4 Cal. Unrep. 924, 38 Pac. 743.

7. *People v. Ward*, 134 Cal. 301, 309, 66 Pac. 372 (holding character testimony is properly stricken out where it is shown upon cross-examination that the witness testified from personal knowledge and not from reputation); *People v. Velarde*, 59 Cal. 457, 462.

8. *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756.

9. *People v. Adams*, 137 Cal. 580, 70 Pac. 662; *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372.

10. *People v. Eckman*, 72 Cal. 582, 14 Pac. 359, holding a certifi-

The trial court may in its discretion limit the number of character witnesses.¹¹

§ 166. Weight and Effect of Evidence.—While it has been said that evidence of good character may be considered by a jury only when the other evidence in the case regarded by itself leaves a doubt in their minds of the guilt of a defendant, it is obvious that this is not the rule, as under it the jury could not consider character except when they would acquit without it. The rule is that evidence of good character comes to the aid of the presumption of innocence and is a fact to be proven as tending in a greater or less degree to establish innocence. It cannot be put aside by the jury in order to ascertain if the other facts and circumstances, considered by themselves, do not establish guilt beyond a reasonable doubt, but must be considered in connection with all the other facts and circumstances of the case.¹² And it may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed but for such good character.¹³ But if the jury is satisfied beyond a reasonable doubt that the defendant is guilty as charged,

cate of discharge from the army to be inadmissible.

11. *People v. Burke*, 18 Cal. App. 72, 89, 122 Pac. 435; *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693.

12. *People v. Bowman*, 81 Cal. 566, 22 Pac. 917; *People v. De La Cour Soto*, 63 Cal. 165; *People v. Doggett*, 62 Cal. 27; *People v. Smith*, 59 Cal. 601; *People v. Casey*, 53 Cal. 360; *People v. Shepardson*, 49 Cal. 629; *People v. Bell*, 49 Cal. 485; *People v. Raina*, 45 Cal. 292 (holding instruction embodying rule erroneously refused); *People v. Fenwick*, 45 Cal. 287, 45 Pac.

287; *People v. Ashe*, 44 Cal. 288 (limiting *People v. Stewart*, 28 Cal. 396); *People v. Lee*, 2 Cal. Unrep. 569, 8 Pac. 685; *People v. Wilson*, 23 Cal. App. 513, 524, 138 Pac. 971; *People v. Baldocchi*, 10 Cal. App. 42, 101 Pac. 28. See *People v. Piner*, 11 Cal. App. 542, 554, 105 Pac. 780, where it is said such evidence is usually important only in doubtful cases.

13. *People v. Doggett*, 62 Cal. 27; *People v. Bell*, 49 Cal. 485. See note, 10 A. L. R. 8, as to propriety of instructions concerning character evidence as affecting question of reasonable doubt.

it is their duty so to find notwithstanding evidence of good character.¹⁴

The good character of a defendant cannot be considered upon the question of intent where the commission of the crime is undisputed, as intent can be determined only from the acts of the defendant.¹⁵

VI. PROOF OF OTHER CRIMES.

§ 167. General Rule of Exclusion.—Universally recognized is the rule that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information.¹⁶ It is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged.¹⁷ Such evidence is inad-

14. *People v. Mitchell*, 129 Cal. 585, 62 Pac. 187; *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500 (instruction embodying rule held correct); *People v. Samsels*, 66 Cal. 99, 4 Pac. 1061; *People v. Bell*, 49 Cal. 485; *People v. Ashe*, 44 Cal. 288; *People v. Von Perhaas*, 20 Cal. App. 48, 127 Pac. 1028; *People v. Piner*, 11 Cal. App. 542, 554, 105 Pac. 780; *People v. Baldocchi*, 10 Cal. App. 42, 101 Pac. 28.

15. *People v. Roberts*, 6 Cal. 214; *People v. Milgate*, 5 Cal. 127.

16. *People v. Cook*, 148 Cal. 334, 83 Pac. 43.

17. *People v. Canfield*, 173 Cal. 309, 159 Pac. 1046; *People v. Hatch*, 163 Cal. 368, 125 Pac. 907; *People v. Glass*, 158 Cal. 650, 662, 112 Pac. 281; *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Buckley*, 143 Cal. 375, 388, 77 Pac. 169;

People v. Carpenter, 136 Cal. 391, 68 Pac. 1027; *People v. Valliere*, 127 Cal. 65, 59 Pac. 295; *People v. Hurley*, 126 Cal. 351, 58 Pac. 814 (bribery); *People v. Lynch*, 122 Cal. 501, 55 Pac. 248; *People v. Vidal*, 121 Cal. 221, 53 Pac. 558; *People v. Elliott*, 119 Cal. 593, 51 Pac. 955; *People v. Sears*, 119 Cal. 267, 51 Pac. 325; *People v. Baird*, 104 Cal. 462, 38 Pac. 310; *People v. Tucker*, 104 Cal. 441, 38 Pac. 195; *People v. Walters*, 98 Cal. 138, 32 Pac. 864; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *People v. Lenon*, 79 Cal. 625, 631, 21 Pac. 967; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. McCauley*, 45 Cal. 146; *People v. Jones*, 32 Cal. 80 (robbery); *People v. Jones*, 31 Cal. 565 (robbery); *People v. Cameron*, 35 Cal. App. Dec. 868, 200 Pac. 969; *People v. Kruvosky*, 35 Cal. App. Dec. 824,

missible either to show a disposition on the part of the defendant to commit such offenses as he is charged with, or as corroborative of the testimony directed to the proof of the specific offense for which he is on trial.¹⁸ Mere proximity of time and place does not render this evidence admissible.¹⁹ Upon the same principle it is not competent for the prosecutor to introduce irrelevant evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury,²⁰ or to give evidence of the prisoner's tendency to commit the offense with which he is charged.¹ It is not competent for him to prove that a defendant has gone under assumed names,² or that he has been accused of the commission of

200 Pac. 831; *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484; *People v. Martin*, 33 Cal. App. Dec. 557, 194 Pac. 522; *People v. Wilkison*, 30 Cal. App. 473, 158 Pac. 1067; *People v. Clark*, 28 Cal. App. 670, 153 Pac. 980; *People v. Phillips*, 27 Cal. App. 409, 150 Pac. 75; *People v. King*, 23 Cal. App. 259, 137 Pac. 1076; *People v. Bartnett*, 15 Cal. App. 89, 96, 113 Pac. 879; *Huntington v. Superior Court*, 5 Cal. App. 288, 292, 90 Pac. 141. See *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697, holding the evidence objected to is not subject to objection of proving another crime. See *ARSON*, vol. 3, p. 170; *BRIBERY*, vol. 4, p. 508.

See note, 3 A. L. R. 784, as to admissibility of evidence to prove other crimes as affected by degree or sufficiency of evidence.

18. *People v. Koller*, 142 Cal. 621, 76 Pac. 500.

19. *People v. Tucker*, 104 Cal. 440, 38 Pac. 195; *People v. Lane*, 100 Cal. 379, 34 Pac. 856.

20. *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890; *People v. Glass*, 158 Cal. 650, 655, 112 Pac. 281; *People v. Lee Dick Lung*, 129 Cal. 491, 62 Pac. 71 (holding the possession of letters from a society of bad character is inadmissible where it is not shown the defendant was a member of such society; *People v. Benoit*, 97 Cal. 249, 31 Pac. 1128 (the reception of the earnings of his daughter by prostitution cannot be proved against a defendant charged with incest); *People v. Dye*, 75 Cal. 108, 16 Pac. 537; *People v. Longland*, 35 Cal. App. Dec. 89, 199 Pac. 546; *People v. Martin*, 13 Cal. App. 96, 108 Pac. 1034. See *BRIBERY*, vol. 4, p. 509.

1. *People v. Lynch*, 122 Cal. 501, 55 Pac. 248; *People v. Jones*, 31 Cal. 565, 571, quoting *Roscoe's Cr. Ev.*, 81. See *infra*, § 176.

2. *People v. Mohr*, 157 Cal. 733, 109 Pac. 476; *People v. Arlington*, 123 Cal. 356, 55 Pac. 1003. See *supra*, § 154.

other crimes,³ or had been arrested and incarcerated,⁴ except when such evidence is relevant to the issue being tried.⁵ Nor can he prove that the defendant was preparing to commit other crimes after the commission of the offense charged,⁶ or that he had in his possession poisons having no relation to the offense charged,⁷ or that he was guilty of immoral conduct. However depraved or vicious a defendant may be, he is entitled to be tried only for the crime charged against him.⁸

Offenses of third persons.—Evidence of a distinct offense by a third person is not admissible, except where the acts and declarations of conspirators are sought to be shown.⁹

§ 168. When Evidence is Admissible Generally.—The rule against the admission of evidence of other crimes does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which a defendant is being tried.¹⁰ Evidence

3. *People v. Argentos*, 156 Cal. 720, 106 Pac. 65.

4. *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *People v. Arlington*, 123 Cal. 356, 55 Pac. 1003.

5. *People v. McCarthy*, 14 Cal. App. 148, 111 Pac. 274.

6. *People v. Jones*, 31 Cal. 565.

7. *People v. Martin*, 13 Cal. App. 96, 108 Pac. 1034.

8. *People v. Williams*, 127 Cal. 212, 59 Pac. 581; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

Evidence of obscene letters and writings of the defendant in no way connected with the crime charged and tending to show him a depraved person is inadmissible. *People v. Martin*, 13 Cal. App. 97, 108 Pac. 1034.

9. *People v. Edwards*, 13 Cal. App. 551, 110 Pac. 342. See *infra*, § 208 et seq.

Upon a prosecution for larceny

of a horse, evidence to show that other persons had stolen other horses in the same neighborhood and about the same time is irrelevant. *People v. Cline*, 83 Cal. 374, 23 Pac. 391.

Proof of the commission of another crime by a member of the defendant's family is also unauthorized. *People v. Cuin*, 27 Cal. App. 316, 149 Pac. 795.

10. *People v. Hatch*, 163 Cal. 368, 125 Pac. 907; *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. Sanders*, 114 Cal. 216, 230, 46 Pac. 153; *People v. Craig*, 111 Cal. 460, 45 Pac. 1033; *People v. Tomlinson*, 102 Cal. 19, 24, 36 Pac. 506 (a letter written by the defendant competent for purposes of impeachment is not rendered inadmissible because it

which is pertinent and tends to prove the crime alleged is not to be rejected because it also tends to prove the commission of other crimes,¹¹ or because it may tend to prejudice the defendant in the minds of the jurors.¹² While it is impossible to state the cases in which such evidence is admissible with categorical precision, generally speaking such evidence is admissible when it tends to establish intent or guilty knowledge,¹³ motive,¹⁴ a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other,¹⁵ when it tends to connect the defendant with the crime charged,¹⁶ or when the other crimes are part of the *res gestae*.¹⁷ Since, however, this character of evidence tends to prejudice the minds of the jurors against a defendant, he should be given the benefit of the doubt, if the evidence is so dubious that the judge cannot clearly perceive the connection between it and the offense charged.¹⁸

By way of illustration, upon a prosecution for assault in which the defense is that the alleged assault was committed in resisting an unlawful arrest, the prosecution

tends to show the commission of another offense); *People v. Walters*, 98 Cal. 138, 32 Pac. 864; *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; *People v. Northcott*, 31 Cal. App. Dec. 346, 189 Pac. 704; *People v. Kizer*, 22 Cal. App. 10, 15, 133 Pac. 513, 521, 134 Pac. 346; *People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579 (an opinion as to genuineness of postal mark, when relevant, is admissible, although it tends to prove another crime); *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513; *People v. Ward*, 5 Cal. App. 36, 89 Pac. 874. See *People v. Taylor*, 6 Cal. Unrep. 942, 69 Pac. 292, holding the possession by the defendant of the cane

of a victim of larceny is admissible as a circumstance showing that the two persons had been together, not to prove another crime.

11. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846.

12. *People v. Walters*, 98 Cal. 138, 32 Pac. 864. See *infra*, § 177.

13. See *infra*, § 169.

14. See *infra*, § 172.

15. See *infra*, § 173.

16. See *infra*, § 174.

17. See *infra*, § 175.

18. *People v. Lane*, 100 Cal. 379, 34 Pac. 856 (quoting from *Shaffner v. Commonwealth*, 72 Pa. 65, 13 Am. Rep. 649).

may show the legality of the arrest though such proof tends to show the commission of another offense.¹⁹ In a forgery case, the death of the person whose name was forged before the date of the instrument being evidence that the instrument is a forgery, it is competent for the prosecution in proof of this fact to show that the defendant murdered such person.²⁰ In a prosecution for recording bets or wagers, evidence that the defendant about the same time committed other acts similar to that charged is admissible to show the true character of the act charged.¹

Where one transaction is alleged as distinct offenses in separate counts, any evidence tending to establish the essentials of either offense is admissible.² If the crime charged consists of a series of acts proof of all such acts may be had as it proves but one offense. Thus in the case of the crime of contributing to the dependency of a minor, one might succeed in leading a minor into a course of conduct described as dependent only after repeated acts of persuasion, yet all such acts are admissible as only one crime is committed.³ So also, upon a prosecution for keeping a place for sale of liquor in prohibition territory, evidence of prior sales is admissible to show the character of the place and the purpose of the defendant at the time of the alleged offense.⁴ But when the charge

19. *People v. Craig*, 152 Cal. 42, 91 Pac. 997.

20. *People v. Sanders*, 114 Cal. 216, 230, 46 Pac. 153.

1. *People v. Schwartz*, 14 Cal. App. 9, 110 Pac. 969.

2. *People v. Fox*, 43 Cal. App. 399, 185 Pac. 211, quoting Underhill on Criminal Evidence, § 88, as follows: "If several crimes are intermixed or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony,

whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme."

3. *People v. Baker*, 38 Cal. App. 28, 35, 175 Pac. 88; *People v. Oliver*, 29 Cal. App. 576, 156 Pac. 1005.

4. *People v. Pera*, 36 Cal. App. 292, 302, 171 Pac. 1091; *People v.*

is the selling of intoxicating liquor upon a specified day, evidence of other sales is inadmissible under the general rule of exclusion.⁵

§ 169. To Prove Guilty Knowledge or Intent.—It is settled that evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible for the purpose of showing guilty knowledge⁶ or intent,⁷ whenever in any case the existence of such knowledge or intent is material and either disputed or doubtful. There is some confusion in the cases as to the principle upon which such evidence is admitted. It has been said that the principle applicable to such evidence

Nolan, 34 Cal. App. 545, 167 Pac. 642; *People v. Canolini*, 29 Cal. App. 526, 156 Pac. 73.

5. *People v. Morales*, 31 Cal. App. Dec. 253, 188 Pac. 58; *People v. Dial*, 28 Cal. App. 704, 153 Pac. 970; *People v. Clark*, 28 Cal. App. 670, 153 Pac. 719.

6. *People v. Bercovitz*, 163 Cal. 636, 43 L. R. A. (N. S.) 667, 126 Pac. 479; *People v. McGlade*, 139 Cal. 66, 72 Pac. 600 (forgery); *People v. Sanders*, 114 Cal. 216, 46 Pac. 153.

7. *People v. Ratledge*, 172 Cal. 401, 156 Pac. 455 (prosecution for practicing medicine without a license); *People v. Lopez*, 135 Cal. 23, 66 Pac. 965 (upon a prosecution for assault with a deadly weapon, evidence to show the defendant cut the face of a friend of the prosecuting witness immediately before assaulting the latter is admissible to illustrate intent and motive); *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091 (arson); *People v. Gray*, 66 Cal. 271, 5 Pac. 240 (embezzlement); *People v. Shainwald*, 51 Cal. 468 (where a former attempt

of the defendant to set fire to the building was proved); *People v. Poo On*, 33 Cal. App. Dec. 110, 192 Pac. 1090 (a prosecution for practicing medicine without a license); *People v. Northcott*, 31 Cal. App. Dec. 346, 189 Pac. 704, 710, 59 Cal. Dec. 415 (per opinion of supreme court denying rehearing, not deciding whether evidence of other abortions are admissible under the circumstances of the case); *People v. Martin*, 33 Cal. App. Dec. 557, 194 Pac. 522; *People v. Flood*, 41 Cal. App. 373, 182 Pac. 763 (the rule applies also where the evidence is given by a codefendant); *People v. Grubb*, 24 Cal. App. 604, 141 Pac. 1051; *People v. King*, 23 Cal. App. 259, 137 Pac. 1076; *People v. Kizer*, 22 Cal. App. 10, 15, 133 Pac. 516, 521, 134 Pac. 346; *People v. Pedde*, 25 Cal. App. 34, 41, 142 Pac. 894; *People v. Arnold*, 17 Cal. App. 63, 73, 118 Pac. 729; *People v. Burns*, 16 Cal. App. 416, 118 Pac. 454 (grand larceny); *People v. Swaile*, 12 Cal. App. 192, 198, 107 Pac. 134 (evidence of throwing rocks

proceeds upon the doctrine of chances.⁸ If it be shown that a defendant has been repeatedly guilty of similar offenses, it may be reasonably and logically inferred that the act charged was accomplished with a felonious intent.⁹ Evidence of other crimes is admissible under this rule only when the intent accompanying the act is equivocal,¹⁰ or where it otherwise becomes an issue in the trial, as where it is claimed that the act in question was free from a felonious intent,¹¹ or was the result of mistake, accident or inadvertence.¹² The evidence is inadmissible if the proof of the commission of the offense carries with it a conclusive implication of guilty intent, or if intent is immaterial,¹³ or if the defendant sets up some affirmative defense and does not seek to evade responsibility on the ground of lack of intent.¹⁴

Furthermore, in order to render the evidence admissible, it must have a direct tendency, in view of the surrounding circumstances, to prove the motive or intent or other material fact.¹⁵ As stated: "It is true that it is not necessary that the collateral offense, whether prior or subsequent, should conclusively prove the guilt of the accused of the offense for the commission of which he is being tried in order to render it admissible in evidence; but as evidence of another offense manifestly tends to his prejudice there ought to be some clear connection between the two offenses by which it may be logically inferred that if guilty of the one he is of the other."¹⁶ For example,

held admissible to rebut the claim that the placing of dynamite near a house was a harmless bluff).

8. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398, citing *Wigmore on Evidence*, § 310.

9. *People v. King*, 23 Cal. App. 259, 137 Pac. 1076.

10. *People v. Byrnes*, 27 Cal. App. 79, 148 Pac. 944.

11. *People v. King*, 23 Cal. App. 259, 137 Pac. 1076.

12. *People v. Byrnes*, 27 Cal. App. 79, 148 Pac. 944.

13. *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Byrnes*, 27 Cal. App. 79, 148 Pac. 944; *People v. Dial*, 28 Cal. App. 704, 153 Pac. 970.

14. *People v. King*, 23 Cal. App. 259, 137 Pac. 1076.

15. *People v. Cook*, 148 Cal. 334, 341, 83 Pac. 43.

16. *People v. Lane*, 100 Cal. 379, 386, 34 Pac. 856, per *Hayne, C.* And

the shooting of one person by another cannot be proved to show the intent with which the latter shot a third person at a different time and for a different cause,¹⁷ unless it is also established that the two shootings were so connected in time, place and circumstance as to make them part of one common plan or design.¹⁸ So also upon a prosecution for larceny or burglary with intent to steal, evidence that the defendant had at another time stolen other property is ordinarily inadmissible to show intent,¹⁹ although such evidence would be admissible if it has a legitimate tendency to show the intent with which the act charged was done, as where the act charged is part of a fraudulent scheme to make money by swindling.²⁰

§ 170. As Affected by Time.—It has been said that when evidence of similar offenses is admitted to show knowledge, the facts should contain an element of warning, while those to establish intent need only negative inadvertence or other innocent explanation of the act. Thus the prior utterance of a fraudulent bill would be evidence to show a knowledge of the fraudulent character of a bill subsequently uttered, but a subsequent utterance would not be evidence of knowledge at a prior date, though it might throw some light upon the intent and

see *Williams v. Casebeer*, 126 Cal. 77, 86, 58 Pac. 380.

17. *People v. Lane*, 100 Cal. 379, 34 Pac. 856.

18. *People v. Gilman*, 31 Cal. App. Dec. 1087, 190 Pac. 205; quoting *People v. O'Bryan*, 165 Cal. 59, 130 Pac. 1044.

The killing by a defendant of his wife's parents shortly after the killing of his wife is admissible to show the killing was part of a common plan and to rebut the claim of accident. *People v. Craig*, 111 Cal. 460, 44 Pac. 186. See *infra*, § 173.

19. *People v. McNutt*, 64 Cal. 116, 28 Pac. 64; *People v. Hartman*, 62 Cal. 562; *People v. Barnes*, 48 Cal. 51; *People v. Wood*, 2 Cal. Unrep. 208. See *infra*, §§ 174, 175.

20. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678 (where the defendants were stealing money in the course of a fraudulent scheme); *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661; *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729; *People v. Burns*, 16 Cal. App. 416, 118 Pac. 454. See *infra*, § 173.

purpose actuating the utterer at the time of the passing of the first bill.¹ In other words, evidence of subsequent offenses is inadmissible upon the question of knowledge, but is relevant to the issue of intent.²

In regard to the distance of time between the principal fact and the collateral fact to be shown in proof of knowledge or intent, no precise rule can be established so far as the admissibility of the evidence is concerned.³ If the principle upon which this evidence is introduced is the doctrine of chances or probabilities, the remoteness of such occurrences in point of time goes to the weight rather than the admissibility of the evidence.⁴ In such cases, if the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the trial court.⁵ The question must be left in a great measure to the discretion of the judge who tries the case.⁶

§ 171. Rule Applied.—Under the rule just stated, it is permissible to show like fraudulent acts in order to illustrate the intent with which the particular act charged was committed.⁷ To prove false pretenses made to obtain money are not inadvertent but deliberately made with

1. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398, per Taggart, J.

2. *People v. Willard*, 92 Cal. 482, 487, 28 Pac. 585; *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590; *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

3. *People v. Frank*, 28 Cal. 507, 518. See *People v. Baird*, 104 Cal. 462, 38 Pac. 310 (evidence of other forgeries nine months after the commission of the forgery charged is inadmissible); *People v. Hill*, 4 Cal. Unrep. 349, 34 Pac. 854 (an embezzlement two months after the offense charged is inadmissible to show intent).

4. *People v. Piercy*, 16 Cal. App. 13, 116 Pac. 322.

5. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

6. *People v. Frank*, 28 Cal. 507, 518.

7. *People v. Rosencrantz*, 44 Cal. App. 236, 186 Pac. 209 (prosecution for passing check without funds or credit at the bank); *People v. Weir*, 30 Cal. App. 766, 159 Pac. 442 (drawing check without sufficient funds on deposit); *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729.

knowledge of the facts and intent to deceive, evidence of prior similar offenses involving the making of other false pretenses is admissible.⁸ Upon a prosecution for receiving stolen goods knowing them to have been stolen, the prosecution, in proof of knowledge, may introduce evidence of prior, but not of the subsequent, receipts of other stolen articles.⁹ Upon a prosecution for forgery, evidence of other forgeries by the defendant of similar instruments about the same time is relevant to show guilty intent,¹⁰ provided it is first proved that the instrument described in the accusation is itself a forgery,¹¹ and provided, further, that it is proved the other instruments are forgeries,¹² and that the defendant was connected therewith.¹³ It is immaterial if the other instruments are the subjects of other prosecutions pending at the time. And the principle is unaffected by the fact that the defendant

8. *People v. Whalen*, 154 Cal. 472, 98 Pac. 194; *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270; *People v. Cory*, 26 Cal. App. 735, 741, 148 Pac. 532; *People v. Edwards*, 25 Cal. App. 660, 145 Pac. 173; *People v. Brecker*, 20 Cal. App. 205, 217, 127 Pac. 666; *People v. Arberry*, 13 Cal. App. 749, 758, 114 Pac. 411; *People v. Emmons*, 13 Cal. App. 487, 497, 110 Pac. 151.

9. *People v. Willard*, 92 Cal. 482, 28 Pac. 585. See RECEIVING STOLEN GOODS.

10. *People v. McGlade*, 139 Cal. 66, 72 Pac. 600; *People v. Bibby*, 91 Cal. 470, 27 Pac. 781; *People v. Frank*, 28 Cal. 507; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59. See *People v. Sindici*, 36 Cal. App. Dec. 141, 201 Pac. 975, holding the evidence tended to prove such similarity of plan or system in committing other acts as to indicate that the offense

charged was likewise the act of the defendant, but not deciding whether it was admissible to prove intent. Per opinion of supreme court denying hearing.

11. Proof that defendant passed other checks which were forged cannot be introduced, when unaccompanied with other inculpatory facts, to establish the corpus delicti. *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99.

12. *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99; *People v. Frank*, 28 Cal. 507, 518. The extrajudicial confessions of the defendant alone are not sufficient evidence of the forgeries to render them admissible. *People v. Baird*, 105 Cal. 126, 38 Pac. 633; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59. See *infra*, § 248.

13. *People v. Bird*, 124 Cal. 32, 56 Pac. 639; *People v. Frank*, 28 Cal. 507, 518.

has been tried and acquitted upon the instruments introduced in evidence, although the force of the evidence may be thereby weakened.¹⁴ To prove knowledge that a coin is a counterfeit, it is competent to show the passage of similar coins upon other occasions with knowledge of their false character.¹⁵ To prove intent to commit arson, evidence of the starting by the defendant of former fires upon the same property is admissible.¹⁶ Upon a charge of embezzlement, previous acts of embezzlement similar to that charged may be shown to prove intent.¹⁷ So also proof of a general shortage brought about by the criminal act of the defendant is admissible where the particular transaction on which the charge is based is included in the general shortage,¹⁸ but not otherwise.¹⁹

§ 172. To Prove Motive.—Evidence of other offenses may be given to show a motive for the commission of the crime charged,²⁰ unless the motive of the defendant is obvious and the real purpose of the evidence is to prejudice the defendant in the minds of the jury.¹ Stated another way, whenever the question of the motive, or purpose, or reason for an act is involved, testimony showing

14. *People v. Frank*, 23 Cal. 507. See FORGERY.

15. *People v. Sanders*, 114 Cal. 216, 230, 46 Pac. 153. See COUNTERFEITING, vol. 7, p. 379.

16. See ARSON, vol. 3, p. 170.

17. *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *People v. Cobler*, 108 Cal. 538, 543, 41 Pac. 401; *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. Hatch*, 13 Cal. App. 521, 536, 109 Pac. 1097; *People v. Robertson*, 6 Cal. App. 514, 519, 92 Pac. 498. See EMBEZZLEMENT.

18. *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428.

19. *People v. Walker*, 142 Cal.

94, 75 Pac. 658, *Shaw, J., Henshaw, J., and Van Dyke, J., dissenting.*

20. *People v. Hatch*, 163 Cal. 368, 379, 125 Pac. 907; *People v. Cook*, 148 Cal. 341, 83 Pac. 43; *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054; *People v. Walters*, 98 Cal. 138, 32 Pac. 864; *People v. Brown*, 35 Cal. App. Dec. 751, 200 Pac. 727; *People v. Gilman*, 31 Cal. App. Dec. 1087, 190 Pac. 205; *People v. Eddards*, 25 Cal. App. 660, 665, 145 Pac. 173; *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369; *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590.

1. *People v. Glass*, 158 Cal. 650, 112 Pac. 281.

such motive, reason or purpose is admissible even though it may establish the commission of other offenses.² Thus, proof of prior crimes by a defendant is admissible to prove a motive for the assault or murder of an officer when attempting to arrest or incarcerate him.³ Evidence of a previous quarrel and murderous assault upon a person by the defendant is admissible to show malice and motive for the subsequent murder of such person.⁴ So also proof of an incestuous relationship between the defendant and his daughter is admissible on a prosecution for the murder of a rival, when it furnishes ground for a logical inference of a desire to put the rival out of the way.⁵ And upon the same principle, where the defendant interposes a defense of insanity through fear that the deceased was trying to debauch his daughter, illicit intercourse between the defendant and his daughter may be shown in rebuttal of the motive assigned.⁶

§ 173. To Prove Design or System.—Where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the general crimes are part of a chain of cause and in consequence so linked as to be necessarily connected with the system or general

2. *People v. Argentos*, 156 Cal. 720, 106 Pac. 65; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Cornell*, 29 Cal. App. 430, 155 Pac. 1026; *People v. Palassou*, 14 Cal. App. 123, 111 Pac. 109.

3. *People v. Prantikos*, 164 Cal. 113, 127 Pac. 1029; *People v. Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652; *People v.*

Valliere, 123 Cal. 576, 56 Pac. 433; *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054; *People v. Poole*, 27 Cal. 572.

4. *People v. Chaves*, 122 Cal. 134, 143, 54 Pac. 596.

5. *People v. Cook*, 148 Cal. 334, 83 Pac. 43.

6. *People v. Lane*, 101 Cal. 513, 36 Pac. 16.

plan, they are admissible.⁷ There is a difference between this use of evidence of other crimes and the one to show intent, for there the object is merely to give a complexion to an act conceded or proved, i. e., to negative innocent intent, while here the object is to evidence a prior general plan, scheme or design, which in its turn is to evidence the doing of the act so planned.⁸ This rule is illustrated in the Ruef case. There it was held that evidence of similar crimes of bribery of a board of supervisors in pursuance of a common scheme to make money on deals for franchises was admissible in corroboration of the particular act of bribery charged.⁹ By way of further illustration, upon a prosecution for receiving stolen goods, it was held that other transactions, both prior and subsequent to the act charged, are admissible as tending to prove a system, and raise an inference that the defendant, if guilty of the other crimes, was guilty of that charged.¹⁰ So also to prove the falsification of a ledger charged, other falsifications which are part of a scheme to conceal a shortage may be shown.¹¹

It has been suggested that the same distinction between the admissibility of evidence of other crimes to show knowledge and to show intent may also be applicable to cases falling under this rule. A design implies a preconceived plan or preparation, while system may be established by any facts showing a general intent coupled with

7. *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Calpestri*, 35 Cal. App. Dec. 883, 200 Pac. 1054 (prosecution for forgery); *People v. Martin*, 33 Cal. App. Dec. 557, 194 Pac. 522 (prosecution for attempting to corrupt jury); *People v. Sindici*, 36 Cal. App. Dec. 141, 201 Pac. 975 (forgery); *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54 (quoted in *State v. Hall*, 45 Mont. 498, 508, 125 Pac. 639); *People v. Tomalty*, 14 Cal. App.

224, 111 Pac. 513; *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590.

8. *People v. Zarate*, 36 Cal. App. Dec. 250, 201 Pac. 975, quoting 1 Greenleaf on Evidence, 72.

9. *People v. Ruef*, 14 Cal. App. 576, 600, 114 Pac. 48, 54.

10. *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590.

11. *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513.

similarity of method or arrangement. While a preconceived plan could not well be inferred from subsequent events, a general system might, it has been said, be deduced from a line of conduct proceeding or following the principal event.¹²

§ 174. To Connect Defendant With Crime Charged.—

It frequently happens that in proving a chain of circumstances pointing to the guilt of a defendant, one or more links of that chain may consist of circumstances tending to prove him guilty of other crimes, but that is no reason for excluding them. There is no reason why the criminality of such intimate and connected circumstances should exclude them, more than other facts apparently innocent.¹³ It is held by all the authorities, that whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible.¹⁴ Thus, on a prosecution for murder committed while burglariously entering a house, it is permissible to show that the defendant committed prior burglaries, at which he had stolen the knife and chisel with which the house was entered, and the pistol with which the murder was committed. There is so palpable a connection between such several crimes that the identification of the means used in the commis-

12. *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398. Compare *People v. Craig*, 111 Cal. 460, 44 Pac. 186, where a subsequent homicide was admitted to show that the killing charged was part of a common plan and to rebut the claim of accident.

13. *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; *People v. Ho Kim You*, 24 Cal. App. 451, 457, 141 Pac.

950 (where evidence of prior conduct of defendant showed he was carrying concealed weapons). See *People v. Harben*, 5 Cal. App. 29, 91 Cal. 398 ("conceding" but not deciding that the evidence is admissible to prove identity).

See note, 3 A. L. R. 1540, as to evidence of other crimes to prove identity of defendant.

14. *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46; *People v. Burke*, 18 Cal. App. 72, 98, 122 Pac. 435, 447.

sion of the crime charged, while incidentally proving the defendant guilty of other crimes, also directly identifies him as the person guilty of the murder.¹⁵ So also upon a prosecution for burglary, evidence that the defendant was arrested when attempting a subsequent burglary and that articles stolen at the first burglary were found in his possession is admissible as tending to connect him with the first burglary.¹⁶ Evidence of the conduct of the defendant subsequent to the commission of the alleged offense, which is admissible as tending to show consciousness of guilt, is not rendered inadmissible because it may tend to prove another crime.¹⁷ Thus it is permissible to prove that the defendant is guilty of the offense of subornation of perjury or of a subsequent attempt to poison the prosecuting witness,¹⁸ or of an attempt to escape from custody.¹⁹

§ 175. As Part of Res Gestae.—When two or more offenses are part of the same transaction, every element of the defendant's conduct in that transaction may be shown for the purpose of illustrating the motive or intent in committing the act which is the basis of the charge. It is essentially res gestae.²⁰ Thus upon a charge of assault or

15. *People v. Rogers*, 71 Cal. 565, 12 Pac. 679.

16. *People v. McGilver*, 67 Cal. 54, 7 Pac. 49; *People v. Cameron*, 35 Cal. App. Dec. 868, 200 Pac. 969.

17. *People v. Mack*, 14 Cal. App. 12, 110 Pac. 967.

18. *People v. Burke*, 18 Cal. App. 72, 98, 122 Pac. 435. See *supra*, § 157, evidence of subsequent conduct of defendant.

19. *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493.

20. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Hatch*, 163 Cal. 368, 379, 125 Pac. 907 (distinguishing *People v. Bartnett*,

15 Cal. App. 89, 113 Pac. 879); *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988; *People v. Ebanks*, 117 Cal. 652, 663, 40 L. B. A. 269, 49 Pac. 1049; *People v. Saunders*, 114 Cal. 226, 46 Pac. 153; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236 (where proof was made of an attempt to assault with a gun which was part of the transaction in which an assault was made with intent to commit mayhem); *People v. Kruvosky*, 35 Cal. App. Dec. 824, 200 Pac. 831; *People v. MacDonald*, 35 Cal. App. Dec. 626, 200 Pac. 491; *People v. Ciulla*, 44 Cal.

murder of one person, evidence of an assault upon or murder of another which is part of the same affray and of the *res gestae* is admissible.¹ In a prosecution for larceny of cattle, the taking and driving away of cattle belonging to different persons, at the same time, from the same place, under the same circumstances and with the same intent, may be proved. As they are part of one transaction, evidence of the one is admissible to show the character of the other.² But evidence that a defendant at another time had stolen other property, which has no connection in time or place or circumstances or intent, with the offense charged, is not admissible.³ In a prosecution for robbery of one person evidence of the robbery of another at the same time is admissible as part of the *res gestae*.⁴ In proving robbery committed in a house, testimony as to the manner in which the defendant entered the house is admissible though it tends to prove burglary.⁵ So also the condition of the clothing of a deceased may be shown

App. 719, 187 Pac. 46 (where the defendant kidnaped a girl and then raped her); *People v. Panagoit*, 25 Cal. App. 158, 165, 143 Pac. 70; *People v. Kafoury*, 16 Cal. App. 718, 117 Pac. 938; *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115; *People v. McPherson*, 6 Cal. App. 266, 91 Pac. 1098.

1. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Prantikos*, 164 Cal. 113, 127 Pac. 1029 (where defendant after killing one police officer killed another while attempting to escape); *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. McClure*, 148 Cal. 418, 83 Pac. 437; *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988; *People v. Smith*, 106 Cal. 73, 39 Pac. 40; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Kruvosky*, 35 Cal. App. Dec. 824, 200 Pac. 831; *People v. Gilmore*, 17 Cal. App.

737, 121 Pac. 697. See also *People v. Walters*, 98 Cal. 138, 32 Pac. 864, holding the killing of a mother immediately after the killing of the son was admissible to show motive and rebut a claim of self-defense.

2. *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; *People v. Lopez*, 59 Cal. 362, 59 Pac. 362; *People v. Robles*, 34 Cal. 591. See *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115, where, on a prosecution for larceny of an automobile, evidence of a theft of gloves in the car was held admissible.

3. See *supra*, § 169.

4. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006.

5. *People v. Courtright*, 10 Cal. App. 522, 102 Pac. 542. See *ROBBERY*.

on a trial for murder, though it may tend to prove that robbery was the motive of the crime. This evidence may not be strictly a part of the *res gestae*, but it is admissible, nevertheless.⁶

§ 176. Sexual Crimes.—In prosecutions involving sexual intercourse by consent the law seems to be well settled that evidence of similar offenses committed between the parties, both prior and subsequent to that with which a defendant is charged, may, if not too remote, be introduced. This rule has been applied to prosecution for adultery,⁷ incest,⁸ seduction under promise of marriage,⁹ statutory rape upon a child under the age of consent,¹⁰

6. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592.

7. *People v. Boero*, 13 Cal. App. 686, 110 Pac. 525.

8. *People v. Koller*, 142 Cal. 621, 76 Pac. 500 (both prior and subsequent acts proved); *People v. Patterson*, 102 Cal. 239, 36 Pac. 436 (prior acts proved). See *People v. Stratton*, 141 Cal. 604, 75 Pac. 166 (where acts of intercourse "forced" upon a daughter were held admissible).

9. *People v. Vitre*, 36 Cal. App. Dec. 144, 201 Pac. 610 (subsequent acts).

10. *People v. Mathews*, 139 Cal. 527, 73 Pac. 416 (previous acts proved); *People v. Castro*, 133 Cal. 12, 65 Pac. 13; *People v. Johnson*, 34 Cal. App. Dec. 557, 197 Pac. 135; *People v. Christian*, 32 Cal. App. Dec. 950, 192 Pac. 182 (subsequent acts proved); *People v. Elgar*, 36 Cal. App. 114, 171 Pac. 697 (subsequent act admitted); *People v. Marino*, 33 Cal. App. 448, 165 Pac. 564 (holding it permissible to prove, not only a prior act, but also a resulting pregnancy, for the

purpose, if for no other, of showing that the conduct of the defendant was tantamount to an admission that he knew of the prosecutrix's pregnancy and that he was the cause thereof); *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734 (prior acts proved); *People v. Parrish*, 25 Cal. App. 314, 143 Pac. 546 (subsequent acts proved); *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945 (subsequent acts proved); *People v. Jacobs*, 16 Cal. App. 478, 117 Pac. 615 (prior acts proved); *People v. Boero*, 13 Cal. App. 686, 110 Pac. 625 (prior acts proved); *People v. Soto*, 11 Cal. App. 430, 105 Pac. 420; *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463 (both prior and subsequent acts proved); *People v. Lewis*, 9 Cal. App. 279, 98 Pac. 1078 (applying rule to the prosecution of an accessory before the fact). See *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040 (holding the evidence to be admissible to account for the absence of outcry, of pain, and of laceration); *People v. Lenon*, 79 Cal. 625, 631, 21 Pac. 967, holding

infamous crime against nature,¹¹ and sexual crimes against children.¹² This rule of law allows the admission also of evidence of any lascivious or other acts of familiarity tending to awaken or promote sexual desires, though not actually amounting to acts of sexual intercourse.¹³ Such evidence is admitted only as corroborative evidence tending to show a disposition on the part of the defendant to commit lascivious acts and a continuous illicit relationship and tending to support the one specific offense for which the defendant is being tried.¹⁴ It is not admitted as proof of independent substantive offenses upon any of which a conviction may be had, and, therefore, is admis-

prior acts of rape without the consent of the child probably inadmissible, as against objection. But see *People v. Ah Lean*, 7 Cal. App. 628, 95 Pac. 380, overruled in *People v. Boero*, 18 Cal. App. 686, and *People v. Converse*, 28 Cal. App. 686.

11. *People v. Ah Leo*, 28 Cal. App. 164, 151 Pac. 748.

12. *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24; *People v. Love*, 29 Cal. App. 521, 157 Pac. 9; *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980 (the offense defined in section 288 of the Penal Code); *People v. Bose*, 28 Cal. App. 743, 153 Pac. 965; *People v. Harrison*, 14 Cal. App. 545, 112 Pac. 733 (although only the commission of lewd acts upon a boy is charged, prior acts of sodomy after the commission of such acts may be proved); *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912, query. See *People v. Hartwell*, 37 Cal. App. 799, 175 Pac. 21, holding an admission by the defendant that he had been warned against committing the crime does not prove previous indulgence, in the absence

of proof of the occasion or reason for the warning.

13. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Wademan*, 38 Cal. App. 116, 125, 175 Pac. 791; *People v. Bose*, 28 Cal. App. 743, 153 Pac. 965 (a prosecution for lewd conduct with a minor child in which evidence of the exhibition to the child of a photograph of a nude woman was held admissible); *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

14. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928 (instruction embodying rule approved); *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Wilhite*, 33 Cal. App. Dec. 126, 193 Pac. 151 (instruction embodying rule held correct); *People v. Elgar*, 36 Cal. App. 114, 171 Pac. 697; *People v. Gasser*, 34 Cal. App. 541, 168 Pac. 157 (instruction embodying rule held correct); *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980; *People v. Ah Leo*, 28 Cal. App. 165, 151 Pac. 748; *People v. Parrish*, 25 Cal. App. 314, 143 Pac. 546.

sible only after the prosecution has selected some particular act of a day certain and has elected to rely on proof of such act for conviction and has introduced evidence tending to support the selection.¹⁵

When a defendant is charged with a sexual crime against one person, the prosecution cannot prove acts committed by him upon other persons,¹⁶ unless done in furtherance of a conspiracy.¹⁷

VII. COMPETENCY AND MATERIALITY.

§ 177. In General—Negative Testimony.—There is a wide distinction between immaterial and incompetent evidence. Evidence may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case but immaterial to any issue before the court.¹⁸ The admissibility of evidence is not affected by objections which relate to its remoteness,¹⁹ or which relate

15. *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980; *People v. Oliver*, 29 Cal. App. 576, 156 Pac. 1005. See *infra*, § 300.

16. *People v. Anthony*, 185 Cal. 152, 196 Pac. 47; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722 (cited as authority in *Hall v. United States*, 235 Fed. 869, 149 C. C. A. 181); *People v. Bowen*, 49 Cal. 654; *People v. Healey*, 35 Cal. App. Dec. 122, 199 Pac. 551; *People v. Wyett*, 33 Cal. App. Dec. 159, 193 Pac. 153; *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057. See, also, *People v. Elliott*, 119 Cal. 593, 51 Pac. 955, holding, on a prosecution for enticing a girl to a house of prostitution, that evidence is inadmissible which tends to show

that the defendant asked others to go.

17. *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484.

18. *People v. Manning*, 48 Cal. 335. See EVIDENCE.

19. *People v. Westlake*, 134 Cal. 505, 66 Pac. 731; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Martin*, 102 Cal. 558, 36 Pac. 952; *People v. Brown*, 76 Cal. 573, 18 Pac. 678; *People v. Cronin*, 34 Cal. 191; *People v. Bliss*, 41 Cal. App. 65, 182 Pac. 63; *People v. Marino*, 33 Cal. App. 448, 165 Pac. 564; *People v. Holloway*, 28 Cal. App. 214, 151 Pac. 975; *People v. Simons*, 25 Cal. App. 723, 145 Pac. 145; *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971; *People v. Piercy*, 16 Cal. App. 13, 116 Pac.

to the credibility of a witness, or, in short, which relate to circumstances to be taken into consideration by the jury.²⁰ Likewise, evidence which is relevant is not rendered incompetent because it is prejudicial to the defendant or reflects discredibly upon him,¹ or because it may awaken feelings of horror or indignation in the minds of the jury,² or because it may not be positive³ or conclusive.⁴

The admissibility of evidence which depends upon the sufficiency of its weight to entitle it to be submitted to the jury is a question resting largely in the determination of the trial court.⁵ Under this rule the court in its discretion may exclude evidence which is remote from the date of the commission of the crime.⁶

Negative testimony.—Testimony is not incomplete because negative in character. Thus, in proof of the fictitious character of a name, it is competent to introduce in evidence a city directory showing that it does not appear therein,⁷ and to show by a police officer that he made an unsuccessful search for the name in directories,⁸ and also searched elsewhere without success for a person of that name.⁹ The character of the directory and the extent of

322; *People v. Pia*, 14 Cal. App. 131, 111 Pac. 105.

20. *People v. Barbera*, 29 Cal. App. 604, 157 Pac. 532.

1. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539; *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369; *People v. Saunders*, 13 Cal. App. 743, 110 Pac. 825; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101. See *supra*, §§ 152, 168.

2. See *infra*, § 223.

3. *People v. Harlan*, 133 Cal. 16, 65 Pac. 9. See *supra*, § 153, and *infra*, § 231.

4. *People v. Shears*, 133 Cal. 154,

65 Pac. 295; *People v. Arnold*, 15 Cal. 476.

5. *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325; *People v. Harben*, 5 Cal. App. 29, 91 Pac. 398.

6. *People v. Cord*, 157 Cal. 562, 108 Pac. 511; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756.

7. *People v. Terrill*, 133 Cal. 120, 65 Pac. 303; *People v. Laird*, 118 Cal. 291, 50 Pac. 431; *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. See, also, *FORGERY*.

8. *People v. Bernard*, 21 Cal. App. 56, 130 Pac. 1063.

9. *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *People v. Eppinger*, 105 Cal. 36, 38 Pac. 638.

the inquiries might affect the weight, but not the competency, of the evidence.

§ 178. Evidence Wrongfully Obtained.—It is laid down that it is no objection to papers or other subjects of evidence which are pertinent to the issue that they were illegally taken from the possession of the party against whom they are offered or were otherwise unlawfully obtained. This rule is based upon the doctrine that when evidence is offered, the court will consider only its competency and not a collateral issue as to the method by which it was obtained.¹⁰ In accordance with this rule, it has been held that letters of a defendant containing incriminatory admissions will not be excluded because they were obtained by strategy and fraud,¹¹ or were intercepted,¹² and that statements of the defendant are not rendered inadmissible by the fact that the witness was eavesdropping when he heard them.¹³ So also evidence obtained by means of a plot to entrap a criminal which amounts to nothing more than procuring corroborative evidence essential to conviction is not rendered incompetent by the manner in which it was obtained.¹⁴ Upon the same principle, a record of another county is not rendered incompetent because of the fact it was removed without proper authority.¹⁵

While an attempt to compel a defendant to produce in court his private books and papers to be used in evidence against him is equivalent to compelling him to be a wit-

10. *People v. Mayen*, 63 Cal. Dec. 252, 205 Pac. 435, (elaborate opinion by Sloane, J., reviewing authorities); *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Alden*, 113 Cal. 264, 45 Pac. 327; *People v. Warren*, 12 Cal. App. 730, 108 Pac. 725; *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134. See SEARCHES AND SEIZURES.

11. *People v. Warren*, 12 Cal. App. 730, 108 Pac. 725.

12. *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134.

13. *People v. Cotta*, 49 Cal. 166.

14. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. See *supra*, § 36.

15. *People v. Alden*, 113 Cal. 264, 45 Pac. 327.

ness against himself,¹⁶ the California court has held that papers obtained by an officer upon an unlawful search and seizure without a search-warrant or any other authority, will be received in evidence, if pertinent. Whatever wrong may be perpetrated by the invasion of one's constitutional rights against unlawful search and seizure, the redress therefor is not in the exclusion of pertinent evidence which may be obtained by the seizure.¹⁷

§ 179. Experiments Generally.—In the discretion of the trial court,¹⁸ evidence may be admitted to show the result of experiments made under conditions and circumstances substantially the same as those existing when the alleged occurrence took place.¹⁹ Evidence of this kind is received with caution, and is admitted only when it is obvious to the court from the nature of the experiments that the jury will be enlightened rather than confused. When the purpose of an experiment is to test the truth of certain testimony, it must be shown to have been made under conditions and circumstances which were essentially the same as those which existed when the alleged occurrence

16. *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517, distinguishing *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, see, also, *Rose's U. S. Notes*.

17. *People v. Mayen*, 63 Cal. Dec. 252, 205 Pac. 435 (reviewing the federal decisions); *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517, following *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372, see, also, *Rose's U. S. Notes*.

See the able article by Dean Wigmore on "Using evidence obtained by illegal search and seizure," 8 *Am. Bar Assn. Journal*, 479.

18. *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People*

v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

A case will not be reversed for an abuse of discretion in rejecting evidence of the result of an experiment, unless the evidence comes clearly within the principles by which it is allowed. *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

19. *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631. See *ARSON*, vol. 3, p. 171. See note, 8 *A. L. R.* 18, as to experimental evidence as affected by similarity or dissimilarity of conditions.

took place. Otherwise its tendency would be to confuse and mislead rather than enlighten the jury.²⁰

While a substantial or reasonable similarity is all that is required,¹ in many circumstances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful rather than helpful.² The question as to the similarity of the conditions and circumstances is, in the first instance, a question of fact for the court, but ultimately rests with the jury under proper instructions of the court.³

The court may also permit experiments to be performed in court in the presence of the jury.⁴ For example, when a door, and hammer and chisel are introduced in evidence, a witness who had testified to an experiment in fitting the hammer and chisel into marks on the door may be required to repeat his experiment before the jury.⁵

Weight and effect.—While the result of experiments may be material and effective in a case,⁶ it is not conclusive, but must be considered in connection with the other evidence in the case.⁷ The fact that the results of experiments made by the prosecution and defendant are diverse does not require them to be disregarded by the

20. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442; *People v. Hill*, 123 Cal. 571, 56 Pac. 443; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

1. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654.

2. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649, quoting with approval from *Hisler v. State*, 52 Fla. 30, 42 South. 692.

3. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

4. See *People v. Searcey*, 121 Cal. 1, 41 L. R. A. 157, 53 Pac. 359, holding that it is not an experiment where nothing is done before the eyes of the jury looking toward the making of an experiment.

5. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

6. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649, limiting the effect of statements in *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

7. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

jury. The situation is the same as a conflict in the evidence.⁸

§ 180. Subjects of Experiments.—It has been common in cases of homicide to make experiments with firearms to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by firearms of certain pattern and caliber, and prove the results thereof at the trial.⁹ Where the distance between the parties is material, the result of experiments showing the distance at which powder marks would appear upon clothing like that worn by the deceased may be proved,¹⁰ provided the conditions at the experiment and at the time of the commission of the crime are substantially the same.¹¹ And in the case of powder marks upon the skin, the difficulty of obtaining the latter substance for experiment is manifest, and it is probable that the result of an experiment made upon white paper would be admissible, the other conditions being substantially the same as the occurrence itself.¹² The ability to recognize a person under conditions substantially the same as those testified to may be shown by experiment,¹³ and it has been held proper in an arson case to prove the length of time it takes a candle to burn.¹⁴

8. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

9. *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

10. *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Clark*, 84 Cal. 573, 24 Pac. 313.

11. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

12. *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654, holding the evidence was properly rejected, however, because the evidence was un-

satisfactory as to the existence of powder-marks about the wound, and uncertain as to the caliber of the revolver used, and also because there was no evidence that the cartridge used was the same in its contents.

13. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442 (coincidence to the minutest detail is not requisite); *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833.

14. *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

§ 181. Evidence Competent Because of Other Testimony—Proof of Part of Transaction.—The introduction of irrelevant evidence on one side does not justify the further introduction of irrelevant evidence by the other,¹⁵ though the party first introducing such evidence cannot complain upon appeal of the introduction of similar evidence in rebuttal.¹⁶ But

“When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.”¹⁷

This rule does not prevent the substance or part of a conversation that a witness heard and remembers being admitted in a proper case.¹⁸ And the fact that a witness cannot remember word for word what was said is not sufficient ground for excluding what he does remember, where it appears that the witness heard and understood the whole statement and remembers the substance thereof.¹⁹ This does not mean, however, that the hearing of such a mere scrap of a conversation as is insufficient

15. *People v. Dye*, 75 Cal. 108, 76 Pac. 537. See *infra*, § 304, rebuttal of irrelevant matters elicited upon cross-examination.

16. See *infra*, § 564.

17. Code Civ. Proc., § 1854; *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734; *People v. Murphy*, 39 Cal. 52. Where a part of the testimony of a witness taken at the preliminary examination is proved, the remainder which is upon the same subject and explanatory of that introduced may be proved. *People v. Arthur*, 93 Cal. 536, 29 Pac. 126.

18. *People v. Luis*, 158 Cal. 185, 110 Pac. 580 (overruling *People v. Keith*, 50 Cal. 137); *People v. Rader*, 136 Cal. 253, 68 Pac. 707; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720 (the testimony of a witness who did not hear all of a conversation is not on that account inadmissible. But the defendant may give in evidence the parts not heard if they in any respect modify or explain the part heard).

19. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

to give the hearer an intelligible understanding of what was said will suffice,²⁰ or that where, by reason of his inability to understand the language of the accused, the witness understood only an occasional word he can testify to the few words he thought he understood,¹ or that, where the witness shows that he fails to remember a portion of the words of the accused used to qualify his statement or that was essential to an understanding of the part given, he can testify to the words he did hear and remember.²

VIII. HEARSAY—DECLARATIONS.

§ 182. **In General.**—Hearsay has been defined to be a species of derivative evidence which is offered for the purpose of establishing some specific fact in a case, and rests on the veracity and competency of some other person than the witness.³ It is the policy of the law to exclude hearsay with certain exceptions,⁴ for the reason that a defendant has the right to be confronted with the witnesses against him as to any act, matter or thing done or said by him, tending to connect him with the commission of

20. *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

1. *People v. Gelabert*, 39 Cal. 663, distinguished in *People v. Ah Wee*, 48 Cal. 236. Compare *People v. Flores*, 34 Cal. App. 393, 167 Pac. 413 (where a confession was partly in English and partly in Spanish, and the portion in English was admitted in evidence); and *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868, holding a witness able to understand a foreign tongue to some extent may testify to that part of a conversation he clearly understood.

2. *People v. Tarbox*, 115 Cal. 57, 64, 46 Pac. 896.

3. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529. See EVIDENCE.

4. Code Civ. Proc., § 1845; *People v. Jan John*, 137 Cal. 220, 69 Pac. 1063; *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. Thornton*, 74 Cal. 482, 16 Pac. 244; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799 (a question, Were you told that there was a certain agreement? calls for hearsay testimony). *People v. Bealoba*, 17 Cal. 389; *People v. Elyea*, 14 Cal. 144 (holding a memorandum of a declaration made by the defendant is not admissible although the witness who made it states it to be correct); *People v. Bartnett*, 15 Cal. App. 89,

the offense;⁵ and for the further reason, that such evidence cannot be subjected to the ordinary tests of its verity, the sanction of an oath, and the opportunity of cross-examination.⁶ The rule applies even when hearsay evidence is offered on behalf of the accused.⁷

§ 183. Declarations of Person Injured.—It is settled rule of evidence that statements made by the victim of a crime which are not part of the *res gestae*,⁸ or dying declarations,⁹ or threats,¹⁰ are hearsay and inadmissible,¹¹ even though the declarant be dead.¹² This is so even though the statements exculpate the defendant, as the rule in civil actions concerning the admissions of a party plaintiff relative to injuries sustained by him, is not applicable to criminal prosecutions in which the people of the state are the sole party plaintiff upon the record.¹³

There is an exception to this rule in the case of declarations as to state of mind by a deceased made up on his departure to meet the defendant,¹⁴ and also in prosecutions

113 Pac. 879; *People v. Mack*, 14 Cal. App. 12, 110 Pac. 967. See EVIDENCE.

5. *People v. Schmitz*, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717, 94 Pac. 407, 419. See *supra*, § 76.

6. *San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999.

7. *People v. McCrea*, 32 Cal. 98. See *infra*, § 183.

8. See *infra*, § 190 et seq.

9. See ABORTION, vol. 1, p. 109; HOMICIDE.

10. See HOMICIDE.

11. *People v. Wolff*, 182 Cal. 728, 190 Pac. 221; *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904; *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838; *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833 (holding a declaration of the deceased not under oath is

inadmissible though made in the presence of the defendant); *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315; *People v. Stewart*, 97 Cal. 238, 32 Pac. 8; *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691; *People v. Ah Lee*, 60 Cal. 85; *People v. Dailey*, 59 Cal. 600; *People v. Corkhuff*, 24 Cal. 640; *People v. Graham*, 21 Cal. 261; *People v. Sullivan*, 2 Cal. Unrep. 552, 8 Pac. 520 (but holding the evidence harmless); *People v. Avila*, 33 Cal. App. Dec. 686, 194 Pac. 768; *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013.

12. *People v. Gress*, 107 Cal. 461, 40 Pac. 752.

13. *People v. McLaughlin*, 44 Cal. 435; *People v. McCrea*, 32 Cal. 98. See EVIDENCE.

14. See *infra*, § 188.

for rape, where the fact that the prosecutrix immediately made complaint of the offense to a third person is admissible for purpose of corroboration. Her statements as to the details of the affair are hearsay and inadmissible, however.¹⁵

§ 184. Declarations of Other Persons.—Declarations of third persons concerning a criminal or unlawful act, which form no part of the *res gestae*, and are not declarations of a co-conspirator relating to the conspiracy are hearsay and inadmissible,¹⁶ whether or not the declarant is dead,¹⁷ and whether¹⁸ or not¹⁹ the statements were made in the presence of the defendant, if his conduct in respect thereto is not proved. But anything said by a defendant which is relevant and material to the commission of an offense is not hearsay and is admissible.²⁰ The same is true of declarations of an agent of the de-

15. See RAPE.

16. *People v. Singh*, 182 Cal. 457, 188 Pac. 987; *People v. Kelly*, 133 Cal. 1, 64 Pac. 1091; *People v. Hill*, 123 Cal. 571, 56 Pac. 443; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783; *People v. Aleck*, 61 Cal. 137; *People v. Clough*, 59 Cal. 438; *People v. Jacobs*, 49 Cal. 384 (per McKinstry, J., and Crockett, J.); *People v. Peck*, 43 Cal. App. 638, 185 Pac. 881; *People v. Khair Din*, 39 Cal. App. 695, 179 Pac. 713; *People v. Wilson*, 36 Cal. App. 589, 172 Pac. 1116; *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734; *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389; *People v. Ernsting*, 14 Cal. App. 708, 112 Pac. 913; *People v. Everett*, 10 Cal. App. 12, 101 Pac. 528; *People v. Schmitz*, 7 Cal. App. 330, 15 L. R. A. (N. S.)

717, 94 Pac. 407, 419; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387.

17. *People v. Landis*, 139 Cal. 426, 73 Pac. 153; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106; *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62, 64.

18. See *infra*, § 196.

19. *People v. Warren*, 134 Cal. 202, 66 Pac. 212; *People v. Clark*, 106 Cal. 32, 39 Pac. 53; *People v. Griffin*, 52 Cal. 616; *People v. Pasqueria*, 30 Cal. App. 625, 159 Pac. 173 (citing *People v. Osaki*, 25 Cal. App. 329, 143 Pac. 789); *People v. Turner*, 1 Cal. App. 420, 82 Pac. 397.

20. *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031. See *infra*, § 194.

fendant within the scope of his agency.¹ The declarations of the wife² or a relative³ of an accused stand upon the same basis as declarations of third persons, and evidence thereof is inadmissible hearsay, unless they are a part of the *res gestae*.

§ 185. Particular Declarations.—Under the rule excluding hearsay, evidence that the culprit was described to the police and that he was identified by means of such description,⁴ or that the defendant was under suspicion of the crime,⁵ is inadmissible. Letters to a defendant warning him of danger are clearly hearsay and inadmissible as evidence of the facts stated therein, where the defendant is in no way connected with the sender, and has not answered or acted upon the letters.⁶ While flight is evidence tending to show guilt, the advice or suggestion of third persons to the defendant that he flee is not, and evidence thereof is inadmissible, especially when the defendant did not act upon it in any way.⁷ If, however, the defendant answered the letter, so much of it as is explanatory of the answer is admissible.⁸

The rule is settled beyond controversy, that in a prosecution for crime, the declaration of another person that he committed the crime is not admissible. Proof of such declaration is mere hearsay evidence and is always excluded,⁹ whether the person making it be living or dead.¹⁰

1. *People v. Brady*, 4 Cal. Unrep. 661, 36 Pac. 949. See *infra*, § 208, as to declarations by co-conspirators.

2. *People v. Altmeyer*, 135 Cal. 80, 66 Pac. 974; *People v. Simonds*, 19 Cal. 275.

3. *People v. Creeks*, 141 Cal. 529, 75 Pac. 101 (mother of defendant).

4. *People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *People v. Johnson*, 91 Cal. 265, 27 Pac. 663.

5. *People v. Vogel*, 36 Cal. App. 216, 171 Pac. 978. See *infra*, § 232.

6. *People v. Lee Dick Lung*, 129

Cal. 491, 62 Pac. 71; *People v. Colburn*, 105 Cal. 648, 38 Pac. 1105.

7. *People v. Lee Dick Lung*, 129 Cal. 491, 62 Pac. 71.

8. *People v. Colburn*, 105 Cal. 648, 38 Pac. 1105.

9. *People v. Raber*, 168 Cal. 316, 143 Pac. 317; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106, per De Haven, J., specially concurring; *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766.

10. *People v. Hall*, 94 Cal. 595,

Such declaration is not admissible even when made on the point of death, as the rule admitting dying declarations goes no further than to make the declaration admissible where the death of the deceased is the subject of the trial, and the circumstances of the death are the subject of the declaration.¹¹ A witness cannot corroborate his testimony by proof of having made similar statements to others,¹² except in rebuttal of the inference that the testimony was manufactured at a late date or was the result of an unfriendly act.¹³ Such evidence may sometimes be admissible for other purposes also.¹⁴ Upon the same principle a witness to the identity of the defendant cannot prove a prior identification of the defendant's photograph, except in rebuttal after an attempt to break down his testimony.¹⁵ However, a detective who pretends to be an accomplice may prove that in fact he was not an accomplice by showing that he disclosed what he was doing to his superior officer. But the court should not permit this rule to be used as a means of opening the door to a mass of irrelevant matter not contemplated by the rule.¹⁶

Writings.—The rule excluding hearsay is not confined to oral statements, as writings may be hearsay. For example, the following are hearsay and inadmissible: A

30 Pac. 7, quoted and followed in *Donnelly v. United States*, 228 U. S. 243, Ann. Cas. 1913E, 710, 57 L. Ed. 820, 33 Sup. Ct. Rep. 449, see, also, *Rose's U. S. Notes*.

11. *People v. Hall*, 94 Cal. 595, 30 Pac. 7. See *HOMICIDE*, for rules as to dying declarations.

12. *People v. Glover*, 141 Cal. 233, 74 Pac. 745; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Ferrara*, 18 Cal. App. 271, 122 Pac. 1089; *People v. Wright*, 4 Cal. App. 704, 89 Pac. 364.

13. See *WITNESSES*.

14. *People v. Henrich*, 35 Cal. App. Dec. 441, 199 Pac. 1058, holding that testimony that the prosecuting witness pointed out the place where the crime occurred was admissible for the purpose of laying the foundation for the introduction of measurements by the second witness relating to the scene of the crime.

15. *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283; *People v. Ferrara*, 18 Cal. App. 271, 122 Pac. 1089.

16. *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396.

letter written by a police officer showing the defendant's criminal career,¹⁷ a public weighmaster's certificate of weight and measure,¹⁸ a train conductor's register of the time of the arrival and departure of trains,¹⁹ and a recital in an order removing a guardian as to the reasons therefor.²⁰ Upon a question whether a corroborating witness was an accomplice of the defendant, evidence of a former acquittal of the witness for complicity in the crime is incompetent as being hearsay.¹ So also the affidavits, reports of the examining physicians, and certificates upon a commitment for insanity are hearsay and inadmissible to prove the sanity of the defendant. In such a proceeding there is no judgment-roll in the sense that it conclusively determines anything.²

§ 186. Declarations in Foreign Language.—A witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness, as he necessarily testifies to what the translator declares the other party said.³ Accordingly, testimony in a foreign tongue offered to sustain a charge of perjury or to impeach a witness can be admitted only when testified to by the interpreter or someone who heard the testimony and understood the language.⁴ The stenographer's notes,⁵ and the testimony of

17. *People v. Powers*, 23 Cal. App. 447, 138 Pac. 373.

18. *People v. Moore*, 32 Cal. App. Dec. 614, 191 Pac. 980.

19. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106. But the testimony of a foreman of street-car line as to running schedule of cars is not hearsay. *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113.

20. *People v. Page*, 116 Cal. 386, 48 Pac. 326.

1. *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082.

2. *People v. Willard*, 150 Cal.

543, 89 Pac. 124, but not deciding whether the judgment and order of commitment are subject to the same objection.

3. *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324.

4. *People v. Lee Ah Yute*, 60 Cal. 95 (holding the interpreter was a proper person to call); *People v. Ah Yute*, 56 Cal. 119; *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283.

5. *People v. Lee Fat*, 54 Cal.

527, in which neither the inter-

the stenographer reading from his notes,⁶ are inadmissible hearsay, even though the interpreter testifies that he accurately translated the testimony.⁷ This rule does not apply, however, to the use on the trial under section 686 of the Penal Code of a deposition taken at the preliminary examination after proof of the death or the inability to find the witness in the state.⁸

§ 187. Exceptions, Real and Apparent.—The hearsay rule is applicable only when the evidence of statements is used testimonially; that is to say, in proof of the facts stated. If the fact to be established is that certain words were spoken, without reference to their truth or falsity, the testimony of any person who heard the statement is original evidence, not hearsay. An instance when this testimony is admitted is when a witness testifies to his carrying of weapons because of information as to what the defendant had said,⁹ or when a statement is made to defendant under such circumstances as to require action or reply from him,¹⁰ or when a prior inconsistent statement is admitted for purpose of impeaching a witness,¹¹ or when utterances are admitted as verbal acts.¹² So also when a witness is unable to remember the date of a transaction, the testimony of a person to whom he repeated it is admissible, not for the purpose of repeating the conversation, but for the purpose of fixing its date.¹³

Among the real exceptions to the hearsay rule are spontaneous declarations which are a part of the *res gestae*,¹⁴

preter nor the reporter was offered as a witness.

6. *People v. Ah Yute*, 56 Cal. 119.

7. *People v. John*, 137 Cal. 220, 69 Pac. 1063.

8. *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467 (distinguishing the cases cited *supra*). See *infra*, § 214 et seq.

9. *People v. Shea*, 8 Cal. 538.

10. See *infra*, § 196.

11. *People v. Jailles*, 146 Cal. 301, 79 Pac. 965.

12. See *infra*, §§ 188, 189.

13. *People v. Zimmerman*, 65 Cal. 307, 4 Pac. 20.

14. See *infra*, § 190.

and dying declarations.¹⁵ A relaxation of the rule is also made, so as to admit in evidence what a witness who is dead or absent from the state swore on a former trial or upon the preliminary examination,¹⁶ to admit evidence of the reputation of the good character of an accused,¹⁷ and to admit hearsay evidence to establish county boundaries.¹⁸

A person's age may be proved by his own testimony, notwithstanding the fact that knowledge of such age is derived from statements of the parents or from family reputation.¹⁹

§ 188. Declarations Showing State of Mind.—Declarations of a person as to his present mental condition made under circumstances excluding suspicion may be competent as evidence of his intention at that time.²⁰ Such declarations are admitted, not altogether under the rule of *res gestae*, or because they are deemed as strictly a part of the principal transaction in dispute, but because they are regarded as indicative of the frame of mind of the declarant as to some act growing out of the principal transaction, and exhibited under such circumstances or conditions as to make it reasonably certain that it was not the result of a premeditated design to prepare a statement of the fact. In other words, the declarations are

15. See *HOMICIDE*.

16. See *infra*, § 214.

17. See *supra*, § 163.

18. *People v. Velarde*, 59 Cal. 459. See *People v. McLane*, 19 Cal. 131, not deciding whether the location of a county boundary can be proved by evidence of general reputation. See *BOUNDARIES*, vol. 4, p. 425.

19. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *People v. Allison*, 44 Cal. App. 118, 185 Pac. 992. See *People v. Mitchell*, 5 Cal. App. 45, 89 Pac. 853, not deciding the point,

but suggesting that to avoid possible error, a proper foundation should be laid by proof that the members of the family and blood relatives from whom the witness received the information are dead or out of the jurisdiction of the court.

20. *People v. Fong Sing*, 38 Cal. App. 253, 175 Pac. 911; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435, quoting *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. Ed. 706, 12 Sup. Ct. Rep. 909, see also *Rose's U. S. Notes*.

regarded as verbal acts from which the state of mind may be inferred, in the same manner as it may be inferred from the actions of the party generally. Upon this theory the declarations of a deceased upon his departure to meet the defendant as to his destination and purpose are admissible in evidence.¹ So also in proof of alibi, it has been held the defendant may prove a declaration as to his destination made when leaving home. But he cannot prove a request by a third person that he go to a certain place unless accompanied by his own declaration that he intends to go there.²

While declarations of a defendant, when procuring the materials to be used in the commission of the crime, as to his purpose, are admissible against him,³ such statements have been held inadmissible in his favor because self-serving,⁴ although it has been intimated that they may be admitted under the present exception to the hearsay rule when contemporaneous with the act.⁵

1. *People v. Wright*, 167 Cal. 1, 138 Pac. 349 (declarations of deceased in abortion case); *People v. Thomas*, 34 Cal. App. Dec. 766, 197 Pac. 677. See *People v. Fong Sing*, 38 Cal. App. 253, 175 Pac. 911, citing *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; *State v. Power*, 24 Wash. 34, 63 L. R. A. 902, 73 Pac. 1112, and other authorities which are to this effect. See *ABORTION*, vol. 1, p. 108.

2. *People v. Fong Sing*, 38 Cal. App. 253, 175 Pac. 911.

3. *People v. Harlan*, 133 Cal. 16, 65 Pac. 9. See *supra*, § 156.

4. See *infra*, § 198.

5. In *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435, the court said the rule undoubtedly is that when the act of a party may be given in evidence, his declarations

made at the time and calculated to elucidate and explain the character and quality of the act and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. In harmony with this rule the trial court allowed the appellant to show what was said and done at the time he secured the dynamite. Prior conversations were properly excluded, however.

§ 189. Declarations as to Bodily or Mental Condition.—When the bodily or mental feelings of a person are material issues, the usual expressions of those feelings, involuntary declarations and exclamations, are admissible as tending in some degree to show present pain or suffering or present physical condition. Such expressions may take any form,—inarticulate, as in groanings; articulate, as in exclamations, or more detailed statement summarized as complaints, but to be admissible they must be expressions of present condition and not merely narrative of past occurrences. Such expressions are but the natural reflexes of what it might be impossible to show by other evidence. They are admissible upon the principle of the *res gestae*, and by analogy thereto.⁶

IX. RES GESTAE.

§ 190. In General.—“Where . . . the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction,”⁷ or as part of the *res gestae*. The term “*res gestae*” is defined as the “things done,” or, liberally speaking, “the facts of the transaction.”⁸ While the term “*res gestae*” has been criticised by eminent authority, it has grown into use as signifying circumstances and declarations which grew out of the main fact and which are contemporaneous with it and serve to illustrate its character.⁹ As said in one case: “*Res gestae* is matter

6. *People v. Bray*, 42 Cal. App. 465, 183 Pac. 712, per Finlayson, J.

7. Code Civ. Proc., § 1850.

8. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115, per Garoutte, J., specially concurring. See EVIDENCE.

9. *People v. Edwards*, 13 Cal. App. 551, 110 Pac. 342.

The facts, circumstances or declarations which grow out of the principal facts in question which are contemporaneous with it and serve to illustrate, qualify or explain it constitute the *res gestae*; *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324.

incidental to the main fact and explanatory of it. It is made up of acts and words which are so closely connected with a main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood."¹⁰

Owing to the varying phases of human affairs, it is not possible to lay down a rule which will determine what is the *res gestae* in every case,¹¹ and each case must be determined upon its own peculiar facts.¹² The term "*res gestae*" has been found a convenient one to apply to different rules of evidence. Most frequently it is applied to spontaneous declarations,¹³ and to the facts and circumstances of the transaction in issue.¹⁴

Articles belonging to the victim of the crime and found in the possession of the defendant have been held admissible as part of the *res gestae*.¹⁵ Declarations of present pain or physical condition have been said to be admissible upon this principle.¹⁶ And it has been held that whatever is said or done by conspirators in furtherance of the common design is a part of the *res gestae*,¹⁷ though this is undoubtedly a loose use of the term.

§ 191. Declarations.—Declarations which are the spontaneous result of the main transaction in question,¹⁸ and which are so connected with it as to illustrate its character,¹⁹ are admissible in evidence as part of the *res gestae*. Under this doctrine evidence is admissible of extrajudicial declarations tending to explain or show the character or motive, or purpose or intent of a transaction,

10. *People v. Edwards*, 13 Cal. App. 551, 110 Pac. 342, quoting *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942.

11. *People v. Wong* Ark, 96 Cal. 125, 30 Pac. 1115, per Garoutte, J., specially concurring.

12. *People v. Wong* Ark, 96 Cal. 125, 30 Pac. 1115, per Paterson, J.

13. See *infra*, § 191.

14. See *infra*, § 193.

15. See *infra*, § 229.

16. See *supra*, § 189.

17. *People v. Pool*, 27 Cal. 572. See *infra*, § 208.

18. See *infra*, § 192.

19. *People v. Wyman*, 15 Cal. 70.

itself a fact in dispute, which would under other or ordinary circumstances be excluded as hearsay or self-serving. In other words, the rule is an exception to the exclusion of that class of proof.²⁰ The theory upon which such testimony is taken out of the general rule against hearsay testimony proceeds upon the supposition that the declarant, without an opportunity deliberately to concoct a false statement or story concerning the transaction for the purpose of exonerating himself from censure or culpability therewith, has spontaneously made some statement which tends to explain the nature, quality, motive or intent of the transaction.¹

Spontaneous statements which are a part of the transaction are admissible in evidence whether made by the defendant,² by the victim of the crime,³ or by a third person.⁴ If they are made by the defendant and answering the requirements of spontaneity, they are admissible though self-serving.⁵ If made by others, they are admissible, though made in the defendant's absence.⁶

§ 192. Spontaneity of Declarations.—A declaration to be admissible as part of the *res gestae* must be an undesignated part or incident of the occurrence in question. It must be the natural and spontaneous outgrowth of the main fact, and must exclude the notion of deliberation or calculation, or the design to manufacture evidence for

20. See EVIDENCE.

1. *People v. Fong Sing*, 38 Cal. App. 253, 175 Pac. 911, per Hart, J.

2. *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969.

3. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152; *People v. Piggott*, 126 Cal. 509, 59 Pac. 31; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375; *People v. Brown*, 59 Cal. 345 (exclamations of deceased when shot, "Oh, God! Oh, my God!") are admissible as part of the *res*

gestae); *People v. Porter*, 32 Cal. App. Dec. 610, 191 Pac. 951; *People v. Gilmore*, 17 Cal. App. 737, 121 Pac. 697.

4. *People v. Jones*, 160 Cal. 358, 117 Pac. 176; *People v. Roach*, 17 Cal. 297.

5. *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506; *People v. Fong Sing*, 38 Cal. App. 253, 175 Pac. 911.

6. *People v. Jones*, 160 Cal. 358, 117 Pac. 176.

future purposes.⁷ While it has been said that the declarations to be admissible must in a general sense be contemporaneous with the main transaction,⁸ it is settled that they need not be precisely concurrent in point of time with the main fact. The controlling consideration in each case is, was the declaration a spontaneous, impulsive statement of the fact. If so, it is a part of the occurrence and is admissible.⁹ If the statement is made after the termination of all action on the part of the wrongdoer, and is merely a narrative of a past transaction, it is inadmissible as part of the *res gestae*, whatever the interval of time intervening between the declaration and the principal act.¹⁰ Such declarations are, it has been said, not facts talking through the party, but the party's talk about the facts.¹¹ Upon the other hand, in the case of sudden attack, declarations would not be admissible merely because the blow immediately preceded it.¹²

Applying the rule just stated, evidence is admissible that the victim during the struggle cried out, "Harry, I am stabbed."¹³ But declarations made by him after the

7. *People v. Wyman*, 15 Cal. 70; *People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386.

8. *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac. 56; *People v. Wyman*, 15 Cal. 70.

9. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115, per Garoutte, J., specially concurring.

10. *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115; *People v. Wasson*, 65 Cal. 538, 4 Pac. 555; *People v. Ehring*, 65 Cal. 135, 3 Pac. 606; *People v. Ah Lee*, 60 Cal. 85 (overruling *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *People v. Gibson*, 33 Cal. App. 459, 166 Pac. 585 (per opinion of supreme court denying rehearing);

People v. Murphy, 28 Cal. App. 708, 153 Pac. 732; *People v. Simonds*, 19 Cal. 275; *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88; *People v. Brown*, 15 Cal. App. 393, 114 Pac. 1004; *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324; *People v. Cyty*, 11 Cal. App. 702, 106 Pac. 257; *People v. Sidelinger*, 9 Cal. App. 298, 99 Pac. 390; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387; *Murphy v. Board of Police Commrs.*, 2 Cal. App. 468, 83 Pac. 577. See *ABORTION*, vol. 1, p. 110.

11. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

12. *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac. 56.

13. *People v. Gilmore*, 17 Cal. App. 737, 121 Pac. 697.

affray are inadmissible,¹⁴ even though made immediately thereafter,¹⁵ or made to a person who, upon hearing a shot, had run a distance of from one hundred and forty to one hundred and seventy-five yards to where the victim lay.¹⁶ Statements made with a view to the apprehension of the offender are inadmissible under this rule.¹⁷ Statements by third persons when capturing the defendant after his flight are inadmissible whether the pursuit covers a distance of a city block or a mile.¹⁸ Declarations made before the commission of the crime and not a part of the transaction leading up to it are inadmissible as part of the *res gestae*.¹⁹ And declarations of the defendant in his own interest made before the main fact,²⁰ or after the termination of the criminal act,¹ are not admissible under this doctrine.

§ 193. Facts and Circumstances.—The *res gestae* embraces not only the actual facts of the transaction² and the circumstances surrounding it,³ but the matters immediately antecedent to and having a direct causal connection with it,⁴ as well as acts immediately following it and

14. *People v. Westlake*, 62 Cal. 303; *People v. McLaughlin*, 44 Cal. 435.

The act of the victim subsequent to the affray in applying vile names to the defendant is inadmissible. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829.

15. *People v. Ah Lee*, 60 Cal. 85 (overruling *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49).

16. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115; *People v. Murphy*, 28 Cal. App. 708, 153 Pac. 732.

17. *People v. Ah Lee*, 60 Cal. 85.

18. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829.

19. *People v. Green*, 143 Cal. 8, 76 Pac. 649.

20. *People v. Henderson*, 28 Cal. 465; *People v. Wyman*, 15 Cal. 70. See *infra*, § 198.

1. *People v. Dice*, 120 Cal. 189, 52 Pac. 477; *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506.

2. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457.

3. *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597; *People v. Costello*, 15 Cal. 350 (where the defendant killed another while injuring a mining claim, evidence that the defendant owned the mine is part of the *res gestae*).

4. *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (evidence that some-

so closely connected with it as to form in reality a part of the occurrence.⁵ As part of the *res gestae*, the prosecution may prove the commission of other crimes by the defendant at the same time as the crime charged.⁶ It may show the condition of the clothing of the victim at the time,⁷ and the condition of his body immediately afterwards.⁸ While the latter may not be strictly part of the *res gestae*, evidence thereof is not prejudicial to the appellant.⁹ The act of the wrongdoer in carrying the body of the victim of an assault to a river and throwing it in is part of the *res gestae*, as is the act of the victim in crawling out of the water.¹⁰ So also the dispersal of the crowd which is the natural and spontaneous outgrowth of the main fact may be proved as part of the *res gestae*.¹¹ The possession of dynamite by one of the de-

one in the saloon spoke of going out to get a scab, and the defendant went with him, is admissible); *People v. Glover*, 141 Cal. 233, 74 Pac. 745; *People v. Smith*, 26 Cal. 665; *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808. See *ABORTION*, vol. 1, p. 109.

5. *People v. Cipolla*, 155 Cal. 224, 100 Pac. 252; *People v. Sivenson*, 49 Cal. 388; *People v. Kafoury*, 16 Cal. App. 718, 117 Pac. 938 (evidence of a miscarriage of a child as a result of an assault is admissible as part of the *res gestae*); *People v. Cytty*, 11 Cal. App. 702, 106 Pac. 257.

6. See *supra*, § 175.

7. *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597 (where on a trial for homicide, evidence showing that deceased's clothing had been burned was held admissible); *People v. Taylor*, 6 Cal. Unrep. 942, 69 Pac. 292 (where on a prosecution from larceny of the person, evidence that the victim's vest was unbuttoned is admissible). See

infra, § 229, admission of clothing in evidence.

8. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186 (rape); *People v. Stewart*, 97 Cal. 238, 32 Pac. 8 (that prosecutrix remained unconscious some hours after escaping from defendant may be shown); *People v. Kafoury*, 16 Cal. App. 718, 117 Pac. 938 (evidence that thigh bone was shattered as result of shooting is admissible). See *infra*, § 223, as to admissibility of photograph.

9. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592. Compare *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359, holding the clothing of the deceased was admissible as part of the *res gestae*. See *People v. Hong Ah Duck*, 61 Cal. 387, to the same effect.

10. *People v. Cipolla*, 155 Cal. 224, 100 Pac. 252.

11. *People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386.

defendant's co-conspirators has been held to be provable as part of the *res gestae*.¹² But a subsequent and independent act of a companion of the defendant is not a part of the *res gestae* of the defendant's act.¹³

X. STATEMENTS AND ADMISSIONS OF ACCUSED.

§ 194. As Evidence Against Him Generally.—Evidence may be given upon a trial of "the act, declaration, or omission of a party, as evidence against such party."¹⁴ The declarations of a defendant which may be proved under this rule are distinct from confessions,¹⁵ and also from contradictory statements introduced in evidence to impeach a witness. It is not necessary, before proving them, to fix time, place and circumstances of alleged statements made by a defendant. His declarations and statements are original evidence against him, and the rules as to impeachment of witnesses do not apply.¹⁶

Defendant's statements, not amounting to a confession, may be used against him, whether they are made in the grand jury room,¹⁷ before the coroner's jury,¹⁸ at the preliminary examination,¹⁹ at the trial,²⁰ or at a prior trial

12. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

13. *People v. Edwards*, 13 Cal. App. 551, 110 Pac. 342.

14. Code Civ. Proc., § 1870, subd. 2; *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; *People v. Sexton*, 132 Cal. 37, 64 Pac. 107; *People v. Johnson*, 34 Cal. App. Dec. 557, 197 Pac. 135; *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124 (admissions to the officer who arrested the accused held admissible); *People v. Panagoit*, 25 Cal. App. 158, 143 Pac. 70 (voluntary statement to attorney for insurance company); *People v. O'Donnell*, 16 Cal. App. 716, 117 Pac. 933 (ad-

mission to district attorney held admissible); *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303; *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. See *ARSON*, vol. 3, p. 173.

15. See *infra*, § 199.

16. *People v. Ferrara*, 31 Cal. App. 1, 159 Pac. 621.

17. *People v. Sexton*, 132 Cal. 37, 64 Pac. 107.

18. *People v. Herbert*, 61 Cal. 544.

19. *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124.

20. *People v. Sexton*, 132 Cal. 37, 64 Pac. 107; *People v. Garcia*, 25

of the charge against him,¹ or in a prior civil or insolvency proceeding,² or elsewhere,³ provided they relate to the crime charged against him.⁴ They may be made while the defendant is in jail or under arrest.⁵ They may be oral or written,⁶ or implied from conduct.⁷ And they may be made over a telephone.⁸

A question by the defendant whether it would be advisable to plead guilty carries with it an admission of more or less significance and may be proved.⁹ While a judicial admission made on a former trial cannot be used as a conclusive admission of the fact upon a second trial, it may be proved as evidence of the fact admitted.¹⁰ The fact that the defendant is tried jointly with another does not exclude proof of admissions made by him.¹¹ Neither does the fact that the witness testifying happens to be a co-conspirator.¹²

§ 195. Voluntary Character—Condition of Defendant.—

While there are statements in some of the cases which seem to intimate that admissions or declarations made by

Cal. 531; *People v. Hobson*, 17 Cal. 424.

1. See *infra*, this section.

2. *People v. Wieger*, 100 Cal. 352, 34 Pac. 826.

3. See *infra*, this section.

4. Upon a prosecution for rape, declarations of a defendant concerning misconduct with other women than the prosecutrix are inadmissible. *People v. Bowen*, 49 Cal. 654.

5. See *People v. White*, 32 Cal. App. Dec. 179, 190 Pac. 821, where the court say that admissions made by a defendant while under arrest or in jail are admissible if voluntarily made. The qualification as to the voluntary character of the admission is undoubtedly applicable only to confessions.

6. *People v. Schafer*, 161 Cal. 573, 119 Pac. 920; *People v. Hartwell*, 39 Cal. App. 24, 177 Pac. 885.

7. See *infra*, § 197.

8. *People v. Herman*, 33 Cal. App. Dec. 362, 193 Pac. 868, holding declaration over a telephone by a person representing himself to be the accused, but unknown to the witness may be admitted in evidence, their weight being for the jury.

9. *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389.

10. *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861.

11. *People v. Shen Ah Fook*, 64 Cal. 380, 1 Pac. 347.

12. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370.

a defendant are inadmissible unless voluntarily made,¹³ it is settled law that the declarations of a defendant, not amounting to a confession of guilt, are admissible without regard to the question whether or not they were voluntary or were made under menace or undue influence.¹⁴ And they are not to be rejected as evidence without preliminary proof that they were voluntary because they may, when connected with other facts, tend to establish guilt,¹⁵ or because they amount to a confession of a crime other than that charged against him.¹⁶ Thus an admission is not to be excluded because induced by a statement that it would be better for the defendant to tell the truth.¹⁷

As affected by condition of defendant.—Words uttered by a defendant while he is not conscious of what he is saying constitute no evidence of guilt and are inadmis-

13. *People v. Shen Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Shen Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. White*, 32 Cal. App. Dec. 179, 190 Pac. 821; *People v. Harris*, 31 Cal. App. Dec. 249, 88 Pac. 65 (holding the admission made was without hope of reward).

14. *People v. Fowler*, 178 Cal. 657, 174 Pac. 892; *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612 (holding admissions were admissible although made when the defendant was handcuffed and confronted with the body of the victim of the crime); *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Kelly*, 146 Cal. 119, 79 Pac. 846; *People v. Jan John*, 144 Cal. 284, 77 Pac. 950; *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141; *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681; *People v. Hickman*, 113 Cal.

80, 45 Pac. 175; *People v. Neary*, 104 Cal. 373, 37 Pac. 943; *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Joy*, 6 Cal. Unrep. 824, 66 Pac. 964; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. De Angelli*, 34 Cal. App. 716, 168 Pac. 699; *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868; *People v. Russell*, 19 Cal. App. 750, 127 Pac. 829; *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957; *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325; *People v. Ward*, 5 Cal. App. 36, 89 Pac. 874.

15. See *infra*, § 199.

16. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612.

17. *People v. Velarde*, 59 Cal. 457; *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325 (an admission is admissible though made pursuant to a suggestion of the sheriff that it would be best for the defendant to make a clean statement of the entire transaction).

sible in evidence against him. This rule would exclude statements made by a defendant while asleep.¹⁸ The mere fact that the defendant was intoxicated when making an admission does not render the evidence incompetent if it appears that he was not so under the influence of liquor as to be unconscious of the meaning and effect of his words.¹⁹ The utterances of an insane man ought not to be treated as evidence against him, though, of course, they may be considered for the purpose of determining his insanity.²⁰

§ 196. Accusation and Reply.—It is provided in substance in the Code of Civil Procedure that evidence may be given of the act or declaration of another in the presence and within the observation of a defendant and of his conduct in relation thereto.¹ While the contrary has been stated generally in a few cases,² it is undoubtedly the California rule that statements of third persons are not admissible in evidence simply because they were made in the presence and hearing of the accused.³ It is only when there is something in the conduct of the accused in response thereto that is material to the issue that they are admissible at all, and they are admissible then solely for

18. *People v. Robinson*, 19 Cal. 40, cited in *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343.

19. *People v. Farrington*, 140 Cal. 656, 74 Pac. 288.

20. *People v. Worthington*, 105 Cal. 166, 38 Pac. 689.

1. Code Civ. Proc., § 1870, subd. 3; *People v. Williams*, 45 Cal. 25; *People v. Woodson*, 29 Cal. App. 531, 156 Pac. 378; *People v. Melandrez*, 4 Cal. App. 396, 88 Pac. 372; *People v. Ah Lung*, 2 Cal. App. 278, 83 Pac. 296; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101. See EVIDENCE.

2. *People v. Piggott*, 126 Cal. 509, 59 Pac. 31; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Moore*, 45 Cal. 19; *People v. Majors*, 32 Cal. App. Dec. 156, 190 Pac. 636.

3. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Philbon*, 138 Cal. 530, 71 Pac. 650; *People v. Foo*, 112 Cal. 17, 44 Pac. 453; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *People v. Ah Yute*, 54 Cal. 89, 53 Cal. 613, opinion in department; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Dean*, 35 Cal. App. Dec. 128, 199 Pac. 561.

the purpose of explaining his conduct.⁴ In other words, it is only the conduct of the accused that is evidence in such cases.⁵

If it is proved that the defendant made incriminating statements or admissions,⁶ or failed to deny an accusation under circumstances which may be construed as an admission of its truth,⁷ or that he failed to act as it might reasonably be expected that an innocent person would act,⁸ evidence of the statement is admissible in connection with evidence of his conduct as an admission or declaration made by him. But if the defendant promptly and fully deny the charge, there is no admission on his part to be introduced in evidence.⁹ This latter rule is subject to a qualification where the defendant in addition and in an attempt to avoid the effect of the accusation immediately makes a statement calculated to deceive or subsequently shown to be false. In such case, however, it is not the accusation which is considered as evidence, but the falsehood.¹⁰ So also if the defendant later admits the accusa-

4. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650; *People v. Machado*, 6 Cal. Unrep. 600, 63 Pac. 66; *People v. Graney*, 32 Cal. App. Dec. 1098, 192 Pac. 460; *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789; *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123.

5. *People v. Lapara*, 181 Cal. 66, 183 Pac. 545; *People v. Teshara*, 134 Cal. 542, 66 Pac. 798; *People v. McCrea*, 32 Cal. 98.

6. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650; *People v. Estrado*, 49 Cal. 171; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51 (holding accusing questions and answers are admissible); *People v. Hartwell*, 39 Cal. App. 24, 177 Pac. 885 (distinguishing *People v. Hartwell*, 37 Cal. App. 799, 175 Pac. 21); *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123; *People v.*

Swaile, 12 Cal. App. 192, 107 Pac. 134.

7. See *infra*, § 197.

8. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Bradley*, 23 Cal. App. 44, 136 Pac. 955.

9. *People v. Anthony*, 185 Cal. 152, 196 Pac. 47; *People v. Lapara*, 181 Cal. 66, 183 Pac. 545; *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Morton*, 139 Cal. 719, 73 Pac. 609; *People v. Teshara*, 134 Cal. 542, 66 Pac. 798; *People v. Estrado*, 49 Cal. 171; *People v. Vogel*, 36 Cal. App. 216, 171 Pac. 978; *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789; *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387; *People v. Turner*, 1 Cal. App. 420, 82 Pac. 397.

10. *People v. Anthony*, 185 Cal.

tion, previous denials are evidence against him on the same principle that his flight would be.¹¹

Of course, assent to statements which do not purport in any manner to connect the defendant with the offense charged cannot be deemed evidence tending to prove guilt.¹² Inasmuch as it is the conduct of the defendant, rather than the statements which are evidence, it is immaterial that the statements calling for a reply are made by a person incompetent to testify,¹³ or whether the declarant at other times made statements inconsistent with the statements testified to.¹⁴ For the same reason, if the proof of the statements or accusations is not followed by proof of the defendant's conduct, it should be stricken out on motion, and if requested, the jury should be instructed as to the purpose for which the statements were admitted.¹⁵

§ 197. Silence as an Admission.—When evidence is offered that the accused remained mute in the face of an accusation of crime, it is, in the first instance, a question for the trial court whether the circumstances are such as to make a failure to reply evidence tending to show an admission.¹⁶ Ordinarily, when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt.¹⁷ And in California, it is

152, 196 Pac. 47; *People v. Vogel*, 36 Cal. App. 216, 171 Pac. 978; *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789; *People v. Turner*, 1 Cal. App. 420, 82 Pac. 397. See *supra*, § 157.

11. *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

12. *People v. Hartwell*, 37 Cal. App. 799, 175 Pac. 21.

13. *People v. McCrea*, 32 Cal. 98 (where the statement was made by a Chinaman).

14. *People v. Bishop*, 36 Cal. App. Dec. 50, 201 Pac. 328.

15. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *People v. Ah Yute*, 54 Cal. 89.

16. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521.

17. *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690; *People v. Wong Loung*, 159 Cal. 520, 114

uniformly held that an accusation of crime calls for a reply even from a person under arrest, or in the custody of an officer, where the circumstances surrounding him indicate that he was entirely free to reply if he chose to do so.¹⁸ This is true even when the accusation is made by an officer.¹⁹ Such evidence would not be admissible if the defendant, because of ignorance of the language used or for any other reason, did not understand the charge against him. But the mere fact that he testified at the trial through an interpreter does not show such lack of understanding.²⁰

The mere fact that the defendant was forbidden to speak to his codefendant¹ or was advised by counsel to remain silent,² does not prevent him from avowing innocence or making any other statement he wished to and does not require the exclusion of the evidence. But the

Pac. 829; *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581 (not deciding point); *People v. Young*, 108 Cal. 8, 41 Pac. 281; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *People v. Estrado*, 49 Cal. 171; *People v. Abbott*, 2 Cal. Unrep. 383, 4 Pac. 769; *People v. Bishop*, 36 Cal. App. Dec. 50, 201 Pac. 328; *People v. Hartwell*, 37 Cal. App. 799, 175 Pac. 21; *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

18. *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690; *People v. Schoon*, 177 Cal. 678, 171 Pac. 680; *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794 (reviewing *Commonwealth v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672, followed as authority for the contrary

rule); *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834. See *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884, which intimates the evidence is inadmissible, but, as pointed out in *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581, the question before the court was one of instructions rather than admission of evidence.

19. *People v. Schoon*, 177 Cal. 678, 171 Pac. 680. But see *People v. Amaya*, 134 Cal. 531, 541, 66 Pac. 794, where McFarland, J., concurring specially, says that one is not called upon to make any reply to questions asked or statements made by an arresting officer.

20. *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690.

1. *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

2. *People v. Graney*, 32 Cal. App. Dec. 1098, 192 Pac. 460.

circumstance that an accusation was made by an excited complaining party to an officer in the act of arresting the defendant, might account for his silence.³

When such evidence is accepted a defendant is entitled to introduce evidence tending to explain his silence and rebut any possible prejudicial effect thereof. He may show, for example, that within a few minutes previous thereto he denied a similar accusation.⁴

§ 198. As Evidence on Behalf of Defendant.—While the extrajudicial statements of a defendant are admissible on behalf of the prosecution,⁵ they are not ordinarily admissible in defendant's favor,⁶ even when made while under a hypnotic state,⁷ unless they are a part of the *res gestae*,⁸ or unless the prosecution has proved only a part of the conversation in which they were made,⁹ or unless they are admissible as a declaration of state of mind made upon departure.¹⁰ The law does not permit a party who intends to perform a criminal act to make statements or declarations, before the act, as to the lawful purpose in mind, and then introduce such declarations to justify himself. They are classed as self-serving declarations and are inadmissible on that account.¹¹

3. *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

4. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521.

5. See *supra*, § 194.

6. *People v. Singh*, 182 Cal. 457, 188 Pac. 987; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Prather*, 120 Cal. 660, 53 Pac. 259; *People v. Dice*, 120 Cal. 189, 52 Pac. 477; *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500; *People v. Brown*, 59 Cal. 345; *People v. Gilman*, 43 Cal. App. 453, 185 Pac. 310; *People v. Bliss*, 41 Cal. App. 65, 182 Pac. 63; *People v. Quan Chuck*, 24 Cal. App. 471, 141 Pac. 940; *People v. Taylor*, 4 Cal. App.

31, 87 Pac. 215; *People v. Bordet*, 13 Cal. App. 426, 110 Pac. 155.

7. *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049.

8. See *supra*, § 191.

9. *People v. Estrado*, 49 Cal. 171; *People v. Farrell*, 31 Cal. 576; *People v. Strong*, 30 Cal. 151. See *supra*, § 181.

10. See *supra*, § 188.

11. *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697 (excluding evidence of declarations made immediately prior to the defendant's departure for the city in which the crime was committed); *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435. See EVIDENCE.

A defendant cannot, for example, prove that at the time he procured the instruments with which the crime was committed he had a lawful purpose in his mind. If such statements were admissible, a person intending to commit a crime could manufacture in advance any amount of evidence in his favor and thus lay a foundation for an acquittal.¹² So also in a prosecution for a crime involving an assault, evidence of prior complaints of the defendant of fear is inadmissible in his favor.¹³ A defendant cannot corroborate his testimony by showing that he made statements to the same effect to other persons,¹⁴ except in some exceptional cases in corroboration of statements made by him on the stand, after an attempt to impeach him by proof of other statements.¹⁵ But, of course, it is no valid objection to testimony given by the defendant under oath in court that it is self-serving.¹⁶

XI. CONFESSIONS.

§ 199. Definition and Nature.—A confession in criminal law is the declaration made by a person who has committed a crime, to another, of the agency or participation he had in the same.¹⁷ The word "confession" is not the mere equivalent of the words "statements" or "declarations,"¹⁸ and is distinct in legal contemplation from the

12. *People v. Wyman*, 15 Cal. 70; *People v. Huntington*, 8 Cal. App. 612, 97 Pac. 760.

13. *People v. Quan Chuck*, 24 Cal. App. 471, 141 Pac. 940.

14. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

15. *People v. Taylor*, 4 Cal. App. 31, 87 Pac. 215. See WITNESSES.

16. *People v. Martel*, 21 Cal. App. 573, 132 Pac. 600.

17. *People v. Miller*, 122 Cal. 84, 54 Pac. 523; *People v. Ammerman*, 113 Cal. 23, 50 Pac. 15; *People v.*

Hickman, 113 Cal. 80, 45 Pac. 175; *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Velarde*, 59 Cal. 457; *People v. Parton*, 49 Cal. 632 (cited in *People v. Wreden*, 59 Cal. 392); *People v. Strong*, 30 Cal. 151; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075; *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

18. *People v. Strong*, 30 Cal. 151; *People v. De Angelli*, 34 Cal. App. 716, 168 Pac. 699. See *People v.*

word "admission." The latter term, as applied to criminal law, relates to matters of fact that do not involve a criminal intent, whereas a "confession" is restricted to an acknowledgment of guilt.¹⁹ The term "confession" does not include admissions of mere acts of guilty conduct, or of subordinate facts not constituting guilt,²⁰ even though, when connected with other facts, they tend to establish guilt.¹ Nor does it include statements of a defendant denying his guilt,² or tending to show his innocence,³ or justifying or excusing his acts,⁴ even though they may contain incriminating admissions.

A confession may be oral or in writing,⁵ and it may be implied from the silence of a defendant under circumstances as to amount to an acknowledgment of guilt.⁶

Eckman, 72 Cal. 582, 14 Pac. 359, holding a statement by a defendant that he would plead guilty voluntarily is not a confession.

19. *People v. Fowler*, 178 Cal. 657, 174 Pac. 892 (quoting 2 Wharton on Criminal Evidence [10th ed.], § 622a); *People v. Schoon*, 177 Cal. 678, 171 Pac. 680; *People v. Velarde*, 59 Cal. 457 (quoting 1 Greenleaf on Evidence, § 170); *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. De Angelli*, 34 Cal. App. 716, 168 Pac. 699.

20. *People v. Fowler*, 178 Cal. 657, 174 Pac. 892; *People v. Schoon*, 177 Cal. 678, 171 Pac. 680; *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Miller*, 122 Cal. 84, 54 Pac. 523 (the admission, in a prosecution for libel, of ownership of the newspaper in which the libelous article was printed, is not a confession).

1. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Jan John*, 144 Cal. 284, 77 Pac. 950; *People v. Miller*, 122 Cal. 84, 54 Pac. 523;

People v. Ammerman, 118 Cal. 23, 50 Pac. 15; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Parton*, 49 Cal. 632 (an admission of having taken improper liberties with the prosecutrix is not a confession of guilt of rape); *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

2. *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Velarde*, 59 Cal. 457; *People v. Dye*, 29 Cal. App. 169, 154 Pac. 875, per Hart, J., concurring.

3. *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681.

4. *People v. Fowler*, 178 Cal. 657, 174 Pac. 892.

5. See *infra*, § 206.

6. *People v. Williams*, 133 Cal. 165, 65 Pac. 323. See *supra*, § 197.

But a plea of guilty withdrawn by permission of court cannot be proved upon the trial as an admission or confession of the defendant.⁷

In determining whether a statement is a confession the court is not concerned with the question how far it tends to prove guilt. That goes to its weight as evidence rather than to its admissibility.⁸

§ 200. Admissibility—Confessions Under Oath.—A confession of a defendant of guilt of the offense charged against him⁹ may properly be received in evidence against him, upon proof that it was voluntarily made,¹⁰ as one is presumed to speak the truth in what he says against himself.¹¹ But a confession of a codefendant or an accomplice or a co-conspirator after the commission of the crime is inadmissible against a defendant,¹² unless made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.¹³

Confessions under oath.—Voluntary admissions of guilt made by a defendant while testifying upon the trial of another person charged with the same offense¹⁴ or while testifying upon a preliminary examination of the charge

7. *People v. Ryan*, 82 Cal. 617, 23 Pac. 121.

8. *People v. Quan Gim Gow*, 23 Cal. App. 507, 138 Pac. 918, quoting *Bram v. United States*, 168 U. S. 532, 42 L. Ed. 568, 18 Sup. Ct. Rep. 183, see, also, *Rose's U. S. Notes*.

9. A confession of another and distinct offense is inadmissible in evidence. *People v. Canfield*, 173 Cal. 309, 159 Pac. 1046.

10. *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Golden-son*, 76 Cal. 328, 19 Pac. 161; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075. See *infra*, § 201.

11. *People v. Brown*, 59 Cal. 345,

12. *People v. Gonzales*, 136 Cal. 666, 69 Pac. 487; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *People v. Aleck*, 61 Cal. 137. See *infra*, § 212.

13. *Sparf v. United States*, 156 U. S. 51, 39 L. Ed. 343, 15 Sup. Ct. Rep. 273, see, also, *Rose's U. S. Notes*. See *supra*, § 197.

14. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106. See *People v. Barrios*, 35 Cal. App. Dec. 111, 199 Pac. 58 (holding confession to be voluntary).

against himself,¹⁵ are competent evidence. Such statements are deemed voluntary unless the defendant objected to answering the particular matter complained of and was nevertheless forced to testify. The mere fact that he was duly sworn to answer questions and was compelled to answer or to admit that his answers might incriminate himself does not render them involuntary.¹⁶ So also a voluntary confession made by a defendant before a coroner's jury¹⁷ or upon a preliminary hearing of the charge against him¹⁸ is admissible against him. The requirement that the testimony of the witnesses at the coroner's inquest be reduced to writing,¹⁹ does not apply to voluntary statements of the defendant, or render them inadmissible if not reduced to writing.²⁰

§ 201. Voluntary Character.—The rule is elementary, even in the absence of constitutional provisions protecting persons accused of crime, that a confession of a defendant to be admissible must be proved to have been given freely and voluntarily, and made without any previous inducement, promise or offer of leniency in punishment or by reason of any duress, intimidation or threat.¹ The

15. *People v. Kelley*, 47 Cal. 125.

16. *People v. Wieger*, 100 Cal. 352, 34 Pac. 826; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106.

17. *People v. Martinez*, 66 Cal. 278, 5 Pac. 261.

18. *People v. Kelley*, 47 Cal. 125; *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124.

19. Pen. Code, § 1515.

20. *People v. Taylor*, 59 Cal. 640.

1. *People v. Borello*, 161 Cal. 367, 119 Pac. 500 (confession held to have been forced by intimidation); *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Benjamin*, 158 Cal. 158, 110 Pac. 302; *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863;

People v. Miller, 135 Cal. 69, 67 Pac. 12; *People v. Esalabe*, 127 Cal. 243, 59 Pac. 577; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73 (confession held to be voluntary); *People v. Barrie*, 49 Cal. 342; *People v. Soto*, 49 Cal. 67; *People v. Ah How*, 34 Cal. 218; *People v. Wing*, 31 Cal. App. 785, 161 Pac. 759; *People v. Dye*, 29 Cal. App. 169, 154 Pac. 875, per Hart, J., concurring; *People v. Andrade*, 29 Cal. App. 1, 154 Pac. 283; *People v. Burns*, 27 Cal. App. 227, 149 Pac. 605; *People v. Imamura*, 26 Cal. App. 432, 147 Pac. 219; *People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63; *People*

theory, of course, is that a prisoner, in making a confession obtained by the influence of hope or fear, applied by a third person to his mind, may be induced by such pressure to admit facts unfavorable to him, without regard to their truth, in order to secure the promised relief or avoid the threatened danger.²

When confession is shown to be true.—Inasmuch as the theory upon which involuntary confessions are excluded is their possible falsity, if the confession discloses incriminating facts which are shown to be true, the reason of the rule ceases to exist, and so much of the confession as discloses the fact and the fact disclosed are competent.³ Thus it may be proved that the defendant made an involuntary confession showing where stolen goods were concealed and that the goods were found there, but a further statement "I buried it in the ground there" is inadmissible, being part of an involuntary admission.⁴

§ 202. Circumstances Rendering Confession Involuntary.—Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it,⁵ and a considerable measure of discretion must be allowed that court in determining the question.⁶ The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. And the courts

v. Hoge, 25 Cal. App. 456, 143 Pac. 1072; People v. Cahill, 11 Cal. App. 685, 690, 106 Pac. 115 (confession held voluntary).

2. People v. Piner, 11 Cal. App. 542, 105 Pac. 780.

3. People v. Murphy, 47 Cal. 103; People v. Hoy Yen, 34 Cal. 176; People v. Ah Ki, 20 Cal. 177, distinguished in People v. Ah How, 34 Cal. 218.

4. People v. Hoy Yen, 34 Cal. 176.

5. See *infra*, § 205.

6. People v. Loper, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; People v. Siemsen, 153 Cal. 387, 95 Pac. 863; People v. Jim Ti, 32 Cal. 60; People v. Dye, 29 Cal. App. 169, 154 Pac. 875, per Hart, J., concurring; People v. Burns, 27 Cal. App. 227, 149 Pac. 605.

have wisely forbore to mark with absolute precision the limits of admission and exclusion.⁷

It is established law that a confession is not rendered involuntary or inadmissible in evidence merely because it was made to a police officer while the accused was under arrest,⁸ or because the defendant was not at the time in full possession of his faculties,⁹ or was under a state of great excitement¹⁰ or because he made it to free another from suspicion of guilt.¹¹ So also the mere fact that a confession is made in answer to questions will not authorize its rejection,¹² though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary.¹³ And it has been held that a confession procured by persistent questioning when the defendant was apparently frightened and unwilling to answer, was involuntary, although no physical force was used and no threats or promises were made.¹⁴

However, the slightest pressure, whether by way of inducement to confess, or threat if confession is withheld,

7. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863, quoting *Hopt v. Utah*, 110 U. S. 574, 28 L. Ed. 262, 4 Sup. Ct. Rep. 202, see, also, *Rose's U. S. Notes*.

8. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442; *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. Walker*, 140 Cal. 153, 73 Pac. 831; *People v. Miller*, 135 Cal. 69, 67 Pac. 12; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73 (whether the arrest was made with or without a warrant is immaterial); *People v. Devine*, 46 Cal. 45 (the fact that the custody was illegal does not render the confession inadmissible); *People v. Abbott*, 2 Cal. Unrep. 383, 4 Pac. 769; *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338; *People v. Flores*, 34

Cal. App. 393, 167 Pac. 413; *People v. Hoge*, 25 Cal. App. 456, 143 Pac. 1072; *People v. Isenberg*, 25 Cal. App. 334, 143 Pac. 791.

9. *People v. Miller*, 135 Cal. 69, 67 Pac. 12.

10. *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505.

11. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421.

12. *People v. Hoge*, 25 Cal. App. 456, 143 Pac. 1072.

13. *People v. Quan Gim Gow*, 23 Cal. App. 507, 138 Pac. 918, quoting *Bram v. United States*, 168 U. S. 532, 42 L. Ed. 568, 18 Sup. Ct. Rep. 183, see, also, *Rose's U. S. Notes*.

14. *People v. Quan Gim Gow*, 23 Cal. App. 507, 138 Pac. 918.

is sufficient to require the exclusion of the confession.¹⁵ For example, a confession is clearly involuntary and inadmissible if it is induced by means of keeping the prisoner in a dark cell or "sweat-box," under circumstances leading him to believe that he would be kept there until he did confess,¹⁶ or if it is induced by a promise that the defendant might go free,¹⁷ or that his punishment would be lighter¹⁸ if he confessed his guilt. So also a confession is not admissible if made in response to a statement by one in authority to the prisoner, that "it would be better for him" to make a full disclosure,¹⁹ or to tell all he knows,²⁰ or if called forth by a statement of the sheriff that he would do all he could for the prisoner.¹ Upon the other hand, a confession is not rendered involuntary because it is preceded by a statement that a confession would relieve the defendant's mind,² or by an admonition to tell the truth,³ or by a statement of an officer that he

15. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863.

16. See *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863, distinguishing cases holding as indicated in the text on the ground the prisoner in the case at bar had himself requested that he be placed alone.

17. *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Warren*, 12 Cal. App. 730, 108 Pac. 725, holding a statement of an officer that "I am satisfied that you know exactly where the diamonds are; come through and tell me where they are; the game is young," is not a promise of immunity.

18. *People v. Johnson*, 41 Cal. 452, distinguished in *People v. Eckman*, 72 Cal. 582, 14 Pac. 359.

19. *People v. Barrie*, 49 Cal. 342; *People v. Johnson*, 41 Cal. 452.

20. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506.

1. *People v. Gonzales*, 136 Cal. 666, 69 Pac. 487.

2. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720, per Angellotti, J., dissenting.

3. *People v. O'Brien*, 35 Cal. App. Dec. 819, 200 Pac. 766 (where the officers urged the defendant to tell the truth and said he might as well make a clean breast of it): *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338 (where the officer admonished the defendant that "the truth would not hurt him, and he better come out and tell it; that they expected him to tell the truth"); *People v. Heivner*, 13 Cal. App. 768, 114 Pac. 411 (quoting *State v. Staley*, 14 Minn. 105); *People v. Wilkison*, 30 Cal. App. 473, 158 Pac. 1067, where the officer, after the defendant declared he would tell the truth, said it is always best to tell the truth.

has sufficient evidence to convict the defendant, and that the latter ought to tell the truth,⁴ when there is nothing to indicate in any way that it was coupled with a threat or that it was to be or was regarded as a promise. A mere secret hope of the defendant that his statement would have the effect of lightening his punishment does not render his statement inadmissible, if that hope is not improperly induced.⁵ So also a confession is not inadmissible in evidence merely because an officer makes the defendant listen to a reading of a confession by an alleged accomplice, although a fear that silence on his part might give rise to inferences against him might be enough to take away from his resulting confession the voluntary character requisite to admissibility.⁶

§ 203. As Affected by Person Offering Inducement.—A distinction is made by many cases in this country and in England between confessions induced by one having no authority or control over the prisoner, and those induced by persons who have such authority, as constables, prosecutors, and the like.⁷ While a confession procured through promises or threats by one in official authority over the prisoner is no doubt involuntary per se, the circumstances of each case must serve as a sole criterion whether a confession is involuntary when induced through promises made by another.⁸ If the promises are made in the presence of one who has authority, under circumstances from which the defendant has a right to assume they were approved by him, the situation is the same as if the promises were made by one in authority.⁹ So also

4. *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338; *People v. Burns*, 27 Cal. App. 227, 149 Pac. 605.

5. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

6. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863.

7. *People v. Smith*, 15 Cal. 408 (not deciding whether distinction exists).

8. *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506. See *supra*, § 202.

9. *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506 (where the district attorney remained silent).

if a person not in authority represents himself as being in a position to secure either complete authority or a lighter sentence, it is probable that promises or threats made by him will render an ensuing confession involuntary.¹⁰ But in the absence of such circumstances, a confession would not be excluded merely because it was induced by the advice of a third person that it would probably be better to tell the truth¹¹ or by a promise that he would do all in his power to conceal the defendant's connection with the crime.¹² In respect to promises or threats held out as inducements to confess, the owner of stolen goods stands in the same relation as a person in authority.¹³

§ 204. As Affected by Prior Inducements—Caution or Warning.—If threats and inducements are made to a prisoner and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt.¹⁴ Upon the same principle, when a confession induced by promises is in substance repeated later, the law presumes the subsequent confession to have been made and influenced by the same hopes and fears as the first, and this presumption continues until it is affirmatively established that such influences had ceased to operate before the second confession was made.¹⁵

Caution or warning.—While the law does not ordinarily require that an accused should be affirmatively instructed

10. *People v. Piner*, 11 Cal. App. 542, 105 Pac. 780.

11. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

12. *People v. Piner*, 11 Cal. App. 542, 105 Pac. 780.

13. *People v. Smith*, 15 Cal. 408.

14. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Jim Ti*, 32 Cal. 60.

See *People v. Miller*, 177 Cal. 404, 170 Pac. 817, holding the admission of the defendant's statement was proper upon the theory that the persistent questioning as to why he committed the crime did not operate upon his mind when telling where he hid the weapon.

15. *People v. Johnson*, 41 Cal. 452.

as to his right to remain silent and of the fact that statements made by him will be used against him,¹⁶ the fact that such a warning or caution was¹⁷ or was not¹⁸ given, will be taken into consideration in determining whether a confession was voluntary or involuntary. It is always better that such warning be expressly given to avoid all suspicion of improper inducement.¹⁹

§ 205. Practice—Laying Foundation.—Ordinarily, it is the proper practice to prove the corpus delicti before proving confessions of the defendant. This is a matter of order of proof and is discussed in another place.²⁰

When a confession is offered in a criminal case, it is incumbent upon the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made.¹ This is a preliminary question addressed to the court, and to be deter-

16. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720, per Angellotti, J., dissenting. See *People v. Clark*, 28 Cal. App. 735, 153 Pac. 980, where the court say: "The alleged admissions were not made as testimony at the hearing or under any other conditions which necessarily required a specific statement to the defendants that anything they said might be used against them."

17. *People v. Dye*, 29 Cal. App. 169, 154 Pac. 875, per Hart, J., concurring; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514.

18. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720.

19. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720, per Angellotti, J., dissenting.

20. See *infra*, § 303.

1. *People v. Fowler*, 178 Cal. 657,

174 Pac. 892; *People v. Miller*, 135 Cal. 69, 67 Pac. 12; *People v. Castro*, 125 Cal. 521, 58 Pac. 133; *People v. Kamauna*, 110 Cal. 609, 42 Pac. 1090 (holding the failure to make a preliminary inquiry as to the voluntary character of a confession harmless under the circumstances of the case). *People v. Soto*, 49 Cal. 67; *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338; *People v. Sweetman*, 32 Cal. App. 645, 164 Pac. 627, 628; *People v. Clark*, 28 Cal. App. 735, 153 Pac. 980; *People v. Hoge*, 25 Cal. App. 456, 143 Pac. 1072; *People v. Svendsen*, 25 Cal. App. 1, 142 Pac. 861; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506.

The fact that the confession is introduced in the guise of impeaching evidence does not obviate proof that it is voluntary. *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544.

mined by it in the first instance, and not by the jury,² and, like other questions touching the admission of evidence, must be decided before the testimony goes to the jury.³ But, as in other cases, a failure to do so is without prejudice if the proof is subsequently introduced.⁴ Upon such preliminary inquiry, the court should permit a cross-examination of the witness to the circumstances under which the confession was made, before permitting the confession itself to be given in evidence.⁵ And if the defendant offers to prove that confession was procured under circumstances rendering it incompetent, it is the duty of the court, before receiving the confession, to hear the proof offered.⁶ If, however, such proof is offered for the first time after the confession is admitted in evidence, it has been held that the court is not required to hear it.⁷ Moreover, a court is not required to strike out a confession given in evidence upon clear proof that it was made voluntarily, merely because the defendant takes the stand

2. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. Ah How*, 34 Cal. 218; *People v. Jim Ti*, 32 Cal. 60; *People v. Zarate*, 36 Cal. App. Dec. 250, 201 Pac. 955; *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338; *People v. Sweetman*, 32 Cal. App. 645, 164 Pac. 627, 628; *People v. Gibson*, 28 Cal. App. 334, 152 Pac. 316; *People v. Burns*, 27 Cal. App. 227, 149 Pac. 605; *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115.

3. *People v. Ah How*, 34 Cal. 218.

4. *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338; *People v. Clark*, 28 Cal. App. 735, 153 Pac. 980.

5. But a refusal to permit such

cross-examination is not ground for reversal unless it appears that the defendant was prejudiced thereby. And if the cross-examination of the witness after the confession was given in evidence fails to show it was not given voluntarily or fails to impeach the testimony in that respect, it is evident the defendant was not prejudiced by a refusal of a prior cross-examination. *People v. Miller*, 135 Cal. 69, 67 Pac. 12; *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338.

6. *People v. Soto*, 49 Cal. 67; *People v. Columbus*, 33 Cal. App. Dec. 470, 194 Pac. 288; *People v. Gibson*, 28 Cal. App. 334, 152 Pac. 316.

7. *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115. But compare § 339.

and attempts to prove it involuntary, as his credibility is for the jury under proper instructions from the court.⁸

A statement of the person to whom a confession was made that no inducements were held out or improper influences exerted by himself or any other person to his knowledge is not objectionable as a conclusion of law.⁹ While prior promises or threats are presumed to influence a subsequent confession,¹⁰ the mere fact that the defendant may have been in charge of other officers prior to the making of the confession does not make it incumbent upon the prosecution to produce them and prove that they did not exert any improper influence.¹¹ A stenographer's report of the proceedings at the making of a confession is not the best evidence of what was done so as to exclude oral testimony in respect thereto.¹²

§ 206. Proof of Confession.—If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged in parol, or if it is written by him, it is then put in evidence as an ordinary document and read by an officer of the court. In the absence of competent written evidence, a confession may be proved by parol evidence, given by any person hearing it made by the defendant and understanding what he said. Where a confession is given through an interpreter, the transcription of the reporter, not subscribed by the defendant or acknowledged by him in any way as being his statement is inadmissible, as the notes and transcription of the reporter constitute simply in effect private memoranda.¹³ A written confession, however, is not the best or any evi-

8. *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442.

9. *People v. Jackson*, 138 Cal. 462, 71 Pac. 566; *People v. Golden-son*, 76 Cal. 328, 19 Pac. 161.

10. See *supra*, § 204.

11. *People v. Herrera*, 32 Cal. App. 610, 163 Pac. 879; *People v. Level*, 27 Cal. App. 257, 149 Pac. 772.

12. *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506.

13. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

dence of anything but its own contents and does not preclude proof of other statements made by the defendant.¹⁴

The whole of what the defendant said upon the subject at the time is to be taken together, and when one part of a confession has been introduced as evidence against him, it is his right to have in evidence the entire statement, including any part of his declaration that would be in his favor.¹⁵ This rule does not, however, prevent the admission of the substance or the part of the confession that a witness heard and remembers.¹⁶

§ 207. Weight and Effect.—Confessions are received with great caution,¹⁷ for the reasons, among others, of the danger of mistake from misapprehension of the witness, the misuse of words, and the failure of the party to express his own meaning.¹⁸ They have been described as a sort of testimony calculated to arouse and stimulate suspicions. Consequently courts preserve the safeguards surrounding their lawful introduction.¹⁹ When, however, a confession is deliberately made and precisely identified, it is substantial evidence of guilt of the most satisfactory nature, so that a defendant may be convicted upon his

14. *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505.

15. Code Civ. Proc., § 1854; *People v. Luis*, 158 Cal. 185, 110 Pac. 580; *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544 (where a letter containing a confession is introduced in evidence, declarations of innocence made by the defendant when advised to write the letter are admissible as part of the same transaction). *People v. Gelabert*, 39 Cal. 663; *People v. Navis*, 3 Cal. 106; *People v. Tugwell*, 28 Cal. App. 348, 152 Pac. 740 (where a subsequent denial of the commission of the crime made within

five minutes of a confession of guilt in a room to which the interview was adjourned was held admissible as a part of the original conversation).

16. *People v. Luis*, 158 Cal. 185, 110 Pac. 580, overruling *People v. Keith*, 50 Cal. 137. See *supra*, § 181.

17. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

18. *People v. Gelabert*, 39 Cal. 663.

19. *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890.

own uncorroborated confession when the corpus delicti is otherwise satisfactorily proven.²⁰

Confessions stand upon the same footing as other evidence and are to be weighed by the jury in the same manner. All parts are not necessarily entitled to the same credit, and the jury, if they see sufficient grounds for so doing, may believe a part and reject the remainder of a confession.¹ But this discretion is not an arbitrary one, and when it may be deemed proper to instruct the jury upon the subject, they should be told that their discretion is to be conscientiously exercised upon a consideration of all the facts and circumstances of the case.²

XII. IN CASES OF CONSPIRACY.

§ 208. In General.—It is a well-settled rule of substantive law that the act or declaration of one conspirator in the prosecution of the enterprise is considered the act or declaration of all and is imputable to all.³ This is the rule of the code,⁴ and it applies though the act or decla-

20. *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075. See *infra*, § 248.

1. *People v. Wyman*, 15 Cal. 70 (approving instruction).

2. *People v. Strong*, 30 Cal. 151.

3. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678. See CONSPIRACY, vol. 5, p. 500 et seq., and p. 525 et seq.

4. Code Civil Proc., § 1870, subd. 6; *People v. Murphy*, 146 Cal. 502, 80 Pac. 709; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Lovren*, 119 Cal. 88, 51 Pac. 22, 638; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *People v. Collins*, 64 Cal. 293, 30 Pac. 847;

People v. Brown, 59 Cal. 345; *People v. Geiger*, 49 Cal. 643; *People v. Cotta*, 49 Cal. 166; *People v. Trim*, 39 Cal. 75; *People v. Murphy*, 39 Cal. 52; *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055; *People v. Sing*, 42 Cal. App. 385, 183 Pac. 865; *People v. Schmidt*, 33 Cal. App. 426, 165 Pac. 555; *People v. Lichtenstein*, 22 Cal. App. 592, 135 Pac. 692; *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123; *People v. Whitelaw*, 7 Cal. App. 622, 95 Pac. 379; *People v. Zimmerman*, 3 Cal. App. 84, 84 Pac. 446; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. See CONSPIRACY, vol. 5, p. 513, for wording of the code provision and cases construing the same.

ration is done or made outside of the presence of such co-conspirator.⁵ Such evidence is original evidence against each of them,⁶ and may be given the same weight by the jury as if the acts or declarations had been done or made by the conspirator against whom they are introduced.⁷ Moreover, the declarations of a co-conspirator who is not being prosecuted are equally admissible with those of one under indictment.⁸ And it has been held that the fact that the conspirator is the wife of the defendant being tried does not affect the admissibility of the evidence.⁹

§ 209. Proof of Conspiracy—Order of Proof.—To authorize the admission of evidence of acts and declarations of co-conspirators, it is a general rule that a foundation must first be laid by proof of the conspiracy,—although this rule is not absolute.¹⁰ The order of proof is within the discretion of the court, and while the practice of permitting the introduction of such testimony before proof of the conspiracy is not to be commended, it is not error to do so.¹¹

5. *People v. Gregory*, 120 Cal. 16, 52 Pac. 41; *People v. Mazzurco*, 33 Cal. App. Dec. 153, 193 Pac. 164; *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055; *People v. Fealy*, 33 Cal. App. 605, 165 Pac. 1034; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532.

6. *People v. MacPhee*, 26 Cal. App. 218, 146 Pac. 522.

7. *People v. Geiger*, 49 Cal. 643.

8. See CONSPIRACY, vol. 5, p. 518.

9. *People v. Murphy*, 45 Cal. 137; *People v. Murphy*, 39 Cal. 52.

10. *People v. Donnolly*, 143 Cal. 394, 77 Pac. 177; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Fehrenbach*, 102 Cal. 394,

36 Pac. 678; *People v. Sing*, 42 Cal. App. 385, 183 Pac. 865; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997. See CONSPIRACY, vol. 5, p. 514.

11. *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678; *People v. Brotherton*, 47 Cal. 388; *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370.

§ 210. **How Conspiracy may be Proved.**—Because of the secrecy with which conspiracies to commit crime are uniformly entered into, it is rarely possible to prove their existence by direct evidence. And the law, on account of the necessity of the case, has deemed it wise and proper to permit circumstantial evidence sufficient to satisfy the jury of its existence.¹² Accordingly, it is competent for the prosecution to prove all the circumstances bearing in any way upon the fact of conspiracy, or upon the acts done in pursuance thereof.¹³ This proof may cover a very extensive and varied field of inquiry, and include evidence of collateral facts in which the defendant bore a principal part.¹⁴ For example, the people may prove the acts of an alleged co-conspirator done before the commission of the crime and tending to show the probability of an understanding between him and the defendant on trial.¹⁵ Of course, evidence of a conspiracy having no connection with the crime charged is irrelevant.¹⁶ While it is permissible for a conspirator, when called as a witness, to testify as to any material fact within his knowledge,¹⁷ evidence of the declaration of an alleged co-conspirator is not admissible to establish the fact of a criminal conspiracy.¹⁸ Such evidence is excluded as hearsay, and, as stated elsewhere in this work, it is excluded lest the jury confuse proof of the conspiracy by such

12. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Gregory*, 120 Cal. 16, 52 Pac. 41; *People v. Kruvosky*, 35 Cal. App. Dec. 824, 200 Pac. 831; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435. And see CONSPIRACY, vol. 5, p. 521.

13. *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055.

14. *People v. Fealy*, 33 Cal. App. 605, 165 Pac. 1034.

15. *People v. Childs*, 127 Cal. 363, 59 Pac. 768 (the fact that the con-

spirators were seen together is relevant); *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; *People v. Bentley*, 75 Cal. 407, 17 Pac. 436; S. C., 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

16. *People v. Williams*, 127 Cal. 212, 59 Pac. 581.

17. *People v. Zimmerman*, 3 Cal. App. 84, 84 Pac. 446.

18. *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. McPhee*, 26 Cal. App. 218, 146 Pac. 522. And see CONSPIRACY, vol. 5, p. 517.

declarations, with proof of the guilt of the defendant.¹⁹ And so it has been held that evidence of declarations of the victim before the crime that there was a conspiracy to injure or kill him is incompetent,²⁰ though it seems that statements in a dying declaration of the victim of the crime are competent proof of a conspiracy.¹ After proof of the conspiracy, however, declarations of co-conspirators may be admitted to show the very inception and creation of the conspiracy.²

§ 211. Determination of Existence of Conspiracy—Degree of Proof.—While the question of the existence of a conspiracy is in the first instance one for the court, its ultimate determination rests with the jury.³ And when there is sufficient evidence of a conspiracy to justify the admission of acts or declarations of a co-conspirator, it is proper practice to submit the question of conspiracy to the jury with an instruction to disregard the declarations unless the conspiracy is satisfactorily proved.⁴

While it is largely in the discretion of the court as to how much evidence of the existence of the conspiracy shall be required before receiving evidence of the acts and declarations of a co-conspirator,⁵ a prima facie case is necessary and sufficient.⁶ In order to establish a conspiracy, there must be evidence of some participation or interest in the commission of the crime, mere proof of association being insufficient.⁷

19. See CONSPIRACY, vol. 5, p. 517.

20. *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

1. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794. See HOMICIDE as to dying declarations generally.

2. *People v. Gregory*, 120 Cal. 16, 52 Pac. 41.

3. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

4. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *People v. Geiger*, 49 Cal. 643 (the holding in this case

as to the sufficiency of the instruction given was followed in *People v. Stephens*, 68 Cal. 113, 8 Pac. 712); *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

5. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720.

6. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678 (quoting Wharton Criminal Evidence [9th ed.], § 698); *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055.

7. *People v. Long*, 7 Cal. App.

§ 212. Requisites of Declarations or Acts—Time Made or Done.—The acts and declarations of one conspirator to be admissible against another must be done or made during the pendency of the criminal enterprise⁸ and in furtherance of its objects.⁹ If done or made after the object of the conspiracy has been accomplished and without the presence of the conspirator on trial, they stand in no different relation to the law and are no more admissible against him than if he were a total stranger to the whole transaction.¹⁰ It has been held that where there is a conspiracy fraudulently to obtain money from an insurance company, declarations of a conspirator after the burning or death and before payment, are made before the

27, 93 Pac. 387. See, also, *People v. Stevens*, 68 Cal. 113, 8 Pac. 712, holding mere proof that the defendant and another were seen upon a public thoroughfare gazing into a store window and that they ran away upon being perceived is not sufficient.

See the following cases in which the evidence was held to be sufficient to establish a conspiracy: *People v. Carson*, 155 Cal. 164, 99 Pac. 970 (conspiracy to escape from prison); *People v. Eldridge*, 147 Cal. 782, 82 Pac. 442; *People v. Moran*, 144 Cal. 48, 77 Pac. 777; *People v. Donnolly*, 143 Cal. 394, 77 Pac. 177; *People v. Lawrence*, 143 Cal. 148, 68 L. R. A. 193, 76 Pac. 893; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Gregory*, 120 Cal. 16, 52 Pac. 41; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Bentley*, 75 Cal. 407, 17 Pac. 436; *People v. Geiger*, 49 Cal. 643; *People v. Mazzurco*, 33 Cal. App. Dec. 153, 193 Pac. 164 (conspiracy to kidnap); *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055; *People v.*

Cory, 26 Cal. App. 735, 148 Pac. 532; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

8. *People v. Aleck*, 61 Cal. 137.

9. See *infra*, § 213; and see CONSPIRACY, vol. 5, p. 523.

10. *People v. Northcott*, 59 Cal. Dec. 415, 189 Pac. 704, 708; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Col-lum*, 122 Cal. 186, 54 Pac. 589; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783; *People v. Uwahah*, 61 Cal. 142; *People v. Aleck*, 61 Cal. 137; *People v. English*, 52 Cal. 211; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Moore*, 45 Cal. 19; *People v. Brady*, 4 Cal. Unrep. 661, 36 Pac. 949; *People v. Dresser*, 17 Cal. App. 27, 117 Pac. 688; *People v. Ay-hens*, 16 Cal. App. 618, 117 Pac. 789; *People v. Edwards*, 13 Cal. App. 551, 110 Pac. 342; *People v. Sidelinger*, 9 Cal. App. 298, 99 Pac. 390. And see CONSPIRACY, vol. 5, p. 524.

consummation of the conspiracy and are admissible against his co-conspirator if in furtherance of its object.¹¹ So also when a conspiracy discloses an intention to divide property stolen, evidence of acts and declarations at any time before the division are admitted upon the theory the conspiracy does not end until that time. But to warrant this procedure, there must be evidence of an intention to divide the spoils.¹² In this connection it must be noted that a conspiracy may be continuing in nature, in which case all acts or declarations done or made during its pendency in furtherance of the common design may be proved.¹³ If, however, the object of a conspiracy has been accomplished, the flight of one conspirator thereafter is not evidence against the other;¹⁴ but it may be admissible in a proper case to show an opportunity to dispose of the fruits of the crime.¹⁵

§ 213. Relation to Conspiracy.—The acts or declarations of one conspirator to be admissible against a co-conspirator must relate to the conspiracy,¹⁶ and must be in aid and furtherance of its common purpose or design.¹⁷ As the words “in furtherance” ex vi termini suggest, they must in some measure aid or assist toward the consummation of the object of the conspiracy.¹⁸ Declarations

11. *People v. Trim*, 39 Cal. 75; *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055; *People v. Fealy*, 33 Cal. App. 605, 165 Pac. 1034.

12. *People v. Opie*, 123 Cal. 294, 55 Pac. 989.

13. *People v. Schmidt*, 33 Cal. App. 426, 165 Pac. 555.

14. *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694 (but holding the testimony was harmless as the attempted escape of the defendant was also proved). Compare *People v. Dean*, 35 Cal. App. Dec. 128, 199 Pac. 561, holding the failure of a companion of the de-

fendant to appear at an appointed meeting place was competent, on a prosecution of obtaining money by false pretenses, as showing the falsity of the representations.

15. *People v. Collins*, 48 Cal. 277, See CONSPIRACY, vol. 5, p. 525, as to flight of co-conspirator.

16. Code Civ. Proc., § 1870, subd. 6; *People v. Scott*, 22 Cal. App. 54, 133 Pac. 496.

17. *People v. Smith*, 151 Cal. 619, 91 Pac. 511. See CONSPIRACY, vol. 5, p. 523.

18. *People v. Smith*, 151 Cal. 619, 91 Pac. 511.

showing past acts¹⁹ or expressing merely the opinion or desire of the conspirator making them are not binding upon anyone except the declarant himself or those in whose presence they are made.²⁰

XIII. EVIDENCE AT PRELIMINARY EXAMINATION OR FORMER TRIAL.

§ 214. In General.—Section 686 of the Penal Code as amended in 1911 declares the right of the defendant to be confronted with the witnesses against him, in the presence of the court, except

“where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witnesses;¹ or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state;² and . . . also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who can-

19. *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

20. *People v. Smith*, 151 Cal. 619, 91 Pac. 511; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

1. *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *People v. Cody*, 117 Cal. 10, 48 Pac. 908; *People v. Sierp*, 116 Cal. 249, 48 Pac. 88; *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; *People v. Oiler*, 66 Cal. 101, 4 Pac.

1066. See *People v. Garrett*, 6 Cal. 203, holding under the former law that the deposition was inadmissible because the magistrate was not authorized or required to take it and because taken before the defendant was held to answer. See WITNESSES, as to use of testimony to refresh memory or for purpose of impeachment.

2. Pen. Code, § 686, subd. 3.

not, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness may be admitted.³

This statute is not unconstitutional,⁴ even when applied to the crime of homicide, as the provision of the constitution authorizing the legislature to provide for the taking of depositions in criminal cases other than homicide, relates to an ordinary extrajudicial deposition, and not to testimony taken at a preliminary examination, though called a deposition.⁵

Testimony of reporter or bystander.—Subdivision 8 of section 1870 of the Code of Civil Procedure, authorizing proof of the testimony of a witness deceased or out of the jurisdiction, given in a former action between the same parties relating to the same matter, is not applicable to criminal prosecutions. The testimony of the witness is provable only by deposition. It cannot be proved by the testimony of the reporter or a bystander, even though, because of noncompliance with the statute, the deposition may be inadmissible.⁶

3. Pen. Code, § 686, subd. 3. The provision authorizing the admission of evidence taken at a former trial was added to the code in 1911. Prior to the code such evidence was inadmissible. *People v. Brotherton*, 47 Cal. 388; *People v. Murphy*, 45 Cal. 137. But it was not admissible as against the defendant under the code as it stood prior to 1911; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Qurise*, 59 Cal. 343, cited in *Mattox v. United States*, 156 U. S. 237, 39 L. Ed. 409, 15 Sup. Ct. Rep. 337, see, also, *Rose's U. S. Notes*; *People v. Chung Ah Chue*, 57 Cal. 567 (distinguishing *People*

v. Devine, 46 Cal. 45). As already stated, however, the defendant himself might have introduced such evidence. See *supra*, § 76.

4. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *People v. Oiler*, 66 Cal. 101, 4 Pac. 1066.

5. *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *People v. Sierp*, 116 Cal. 249, 48 Pac. 88; *People v. Wilson*, 26 Cal. App. 336, 146 Pac. 1048.

6. *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, limiting effect of intimidation in *People v. Carty*, 77 Cal. 213, 19 Pac. 490.

§ 215. Application of and Limitations on Rule.—Section 686 of the Penal Code authorizing the admission in evidence of depositions taken at a preliminary examination embraces all kinds of criminal cases, including homicide;⁷ but it has reference only to depositions of witnesses other than the defendant, who, of course, cannot be put upon trial for a felony in his absence or if he is insane.⁸

To be admissible the deposition must have been taken upon the preliminary examination of the charge for which the defendant is being tried. A stipulation that the evidence of a witness on one examination should be considered as taken upon the preliminary examination of the defendant upon each of the charges against him, including the one on trial, does not render admissible portions of the deposition applicable solely to the other charges against the defendant.⁹ Yet the mere fact that two persons separately are charged with different offenses upon the person of another and that a part only of the deposition of the witness relates to the charge against the defendant on trial, does not prevent the people from introducing such parts of the deposition as are competent.¹⁰ It has been held, however, that the deposition is not rendered inadmissible by reason of the fact that the charge upon which the defendant was examined is not the same as that for which he was held to answer.¹¹

The fact that the testimony of the witness was taken through an interpreter does not render the deposition inadmissible, for whether so taken or not, it is the original testimony of the witness.¹² It is questionable whether

7. *People v. Sierp*, 116 Cal. 249, 48 Pac. 88.

8. *People v. Thourwold*, 31 Cal. App. Dec. 570, 189 Pac. 124.

9. *People v. Brennan*, 121 Cal. 495, 53 Pac. 1098.

10. *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200.

11. *People v. Hart*, 28 Cal. App. 335, 152 Pac. 947, where the de-

fendant was arraigned before a magistrate upon a charge of grand larceny but at the close of the hearing he was held to answer for embezzlement.

12. *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467; *People v. Sierp*, 116 Cal. 249, 48 Pac. 88 (distinguishing *People v. Lee Fat*, 54 Cal. 527, on the ground that the

the deposition of a witness taken at a preliminary examination is rendered inadmissible by the taking of a subsequent deposition under commission.¹³

Necessity of compliance with statute.—The statute authorizing the admission in evidence of the deposition of a witness at preliminary examination of a defendant is in derogation of defendant's right to be confronted with the witnesses against him, and will be liberally construed in his favor.¹⁴ It is to be taken in *pari materia* with section 869 of the Penal Code prescribing the manner of taking such deposition,¹⁵ and any real departure from the course prescribed renders the deposition inadmissible in evidence.¹⁶ For example, there is no such deposition as is contemplated by the statute, and the deposition is inadmissible, if the testimony is not taken down by question and answer,¹⁷ or if there is no certificate, or if the certificate is materially defective.¹⁸

§ 216. Laying Foundation.—In order that the testimony of a witness at the preliminary examination or a former trial may be admissible in evidence, it must first be satisfactorily shown to the court that the witness is dead,¹⁹ or insane, out of the jurisdiction,²⁰ or that he cannot with

interpreter was in court and testified); *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46.

13. *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247.

14. *People v. Ward*, 105 Cal. 652, 39 Pac. 33; *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862.

15. *People v. Ward*, 105 Cal. 652, 39 Pac. 33; *People v. Morine*, 54 Cal. 575.

16. *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862.

17. *People v. Clark*, 151 Cal. 200, 90 Pac. 549.

18. *People v. Ward*, 105 Cal. 652,

39 Pac. 33; *People v. Carty*, 77 Cal. 213, 19 Pac. 490 (if the certificate of the reporter is defective, it cannot be aided by oral testimony and then admitted).

19. *People v. Douglass*, 100 Cal. 1, 34 Pac. 490, where the death of the witness is admitted, an objection that due diligence to produce the witness is not shown is untenable.

20. *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (evidence held sufficient to show absence of witness); *People v. Pasqueria*, 30 Cal. App. 625, 159 Pac. 173 (absence of witness from state justifies admission

due diligence be found within the state.¹ The illness of a witness within reach of process of subpoena will not justify the admission of his deposition.² It is not necessary to show that the official reporter at the preliminary hearing,³ or the interpreter⁴ was sworn, or that the reporter filed his original notes with the clerk. Indeed, any irregularity in failing to file such notes is cured by filing them before the conclusion of the trial.⁵ Questions directed to the qualifications of the reporter are immaterial, as any objections to lack of qualifications must be made at the preliminary examination.⁶

The existence of the circumstances authorizing the admission of the deposition cannot be proved by affidavit, as such proof would deprive the defendant of his right to be confronted with witness against him.⁷ It is within the discretion of the trial judge to determine whether or not a sufficient foundation has been laid entitling such testimony to be read in evidence, and the court's ruling cannot be disturbed if there is any evidence to support its conclusion.⁸

§ 217. Due Diligence to Find Witness.—It is within the discretion of the trial court to determine what showing of diligence to find a witness within the state is sufficient to authorize the admission of his testimony at the prelimin-

of his deposition given at the preliminary examination); *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

1. See *infra*, § 217. See note, 15 A. L. R. 495, as to use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial.

2. *People v. Bojorquez*, 55 Cal. 463.

3. *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46.

4. While it is the duty of the

magistrate to place the interpreter under oath, the burden of proving that he was not sworn is upon the defendant. *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46.

5. *People v. Eslabe*, 127 Cal. 243, 59 Pac. 577.

6. *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

7. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904.

8. *People v. Wilson*, 26 Cal. App. 336, 146 Pac. 1048; *People v. Lederer*, 17 Cal. App. 369, 119 Pac. 949.

ary examination or at a former trial, and its action, like its decision upon any other question of fact, will not be disturbed upon appeal unless its discretion is abused;⁹ that is, unless it appears that the evidence is insufficient to support the finding of due diligence.¹⁰

The term "diligence" is a relative term incapable of exact definition and depends upon the circumstances of each case with all their distinct and varying phases and bearings.¹¹ Subpoenas for the witness that have been

9. *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467 (the court should be "fully satisfied" before allowing the deposition to be read); *People v. Gannon*, 61 Cal. 476; *People v. Ramos*, 35 Cal. App. Dec. 81, 199 Pac. 544; *People v. Trent*, 25 Cal. App. 740, 145 Pac. 541; *People v. Dene*, 20 Cal. App. 137, 128 Pac. 339; *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46; *People v. Lederer*, 17 Cal. App. 369, 119 Pac. 949; *People v. Edwards*, 14 Cal. App. 128, 111 Pac. 263; *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103; *People v. Ballard*, 1 Cal. App. 222, 81 Pac. 1040 (discretion held to have been abused as the efforts made were of a perfunctory character).

In the following cases it was held that the showing of due diligence to locate the witness was sufficient to render the deposition admissible: *People v. Grill*, 151 Cal. 592, 91 Pac. 515; *People v. Goodrich*, 142 Cal. 216, 75 Pac. 796 (where the wife of the witness testified to his absence from the state); *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779; *People v. Reilly*, 106 Cal. 648, 40 Pac. 13; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006 (a statement

on oath by the district attorney that the witness intended to leave the state, and would notify him if he remained, and that no notice was received, is sufficient to admit the deposition); *People v. Riley*, 75 Cal. 98, 16 Pac. 544 (where subpoenas were sent to different counties for service); *People v. Davis*, 4 Cal. Unrep. 524, 36 Pac. 96 (when the witness had disappeared); *People v. Ramos*, 35 Cal. App. Dec. 81, 199 Pac. 544 (where the witness was at sea); *People v. Johnson*, 34 Cal. App. Dec. 557, 197 Pac. 135; *People v. Poo On*, 33 Cal. App. Dec. 110, 192 Pac. 1090; *People v. Boyd*, 16 Cal. App. 130, 116 Pac. 323 (where the witness was endeavoring to avoid service of process); *People v. Melandrez*, 4 Cal. App. 396, 88 Pac. 372 (holding the court may admit the deposition on proof that considerable search was made for the witness in and about the places he formerly frequented and that the officers had been unable to find him).

10. *People v. Mueller*, 168 Cal. 526, 143 Pac. 750.

11. *People v. Ramos*, 35 Cal. App. Dec. 81, 199 Pac. 544; *People v. Boyd*, 16 Cal. App. 130, 116 Pac. 323; *People v. Johnson*, 13 Cal. App. 776, 110 Pac. 965.

issued to other counties may be received in evidence for the purpose of showing the exercise of diligence.¹² But it is not necessary that it be shown that a subpoena for the witness has been sent to every county in the state, as the exercise of diligence may be shown in other ways.¹³ It may be shown that the witness is absent from the state,¹⁴ and evidence of a party that he had received letters from the witness from without the state is competent for this purpose.¹⁵ The competency of evidence upon a preliminary question of this kind is not governed by strict rules applicable to the admission of evidence upon the issues of the case. Anything which will reasonably satisfy the court of the absence of the witness and that he is not likely to return within its jurisdiction may be admitted.¹⁶ When the officer seeking the witness is informed that he has gone to another town in the state, reasonable diligence would seem to require that such information be followed up.¹⁷ But the fact that the prosecution at the time of the preliminary examination knew the witness would be absent at the trial, and failed to request that he be put under bonds to secure his appearance, is not a failure to exercise due diligence and does not render his deposition inadmissible.¹⁸ A defendant cannot show the exercise of due diligence by showing

12. *People v. Barker*, 144 Cal. 705, 78 Pac. 266 (the fact that a subpoena was not properly signed does not affect its admissibility for this purpose); *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467.

13. *People v. Caballero*, 41 Cal. App. 146, 182 Pac. 321; *People v. Boyd*, 16 Cal. App. 130, 116 Pac. 323.

14. *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (holding that the uncontradicted evidence of the father of the witness of the latter's absence from the state justified the trial court in finding that he could

not with due diligence be found in the state).

15. *People v. Barker*, 144 Cal. 705, 78 Pac. 266. See *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103, in which it was conceded that a telegram sent to the witness in another state and his answers thereto were inadmissible as hearsay.

16. *People v. Barker*, 144 Cal. 705, 78 Pac. 266.

17. *People v. Weston*, 169 Cal. 393, 146 Pac. 871.

18. *People v. Flannery*, 3 Cal. App. 41, 84 Pac. 461.

that he relied upon a subpoena for the witness issued by the prosecution, as the prosecution has a right to withdraw the subpoena.¹⁹

§ 218. Objection, Explanation and Effect.—While the deposition of one testifying at a preliminary examination may under certain circumstances be used at the trial, nevertheless when so used, it, like depositions taken on behalf of the defendant conditionally and in cases where witnesses are without the state, is subject to the same objections as though the witness was present and testifying.²⁰ The fact that no objection was interposed by the defendant at the preliminary hearing does not bar him from objecting when the deposition is read at the trial.¹ However, the mere fact that an answer of the witness in the deposition is uncertain does not require the trial court to strike it out, as such an objection goes to its weight rather than to its admissibility.² It is doubtful if it is permissible, against objection, to allow the reporter to explain matters as to which the deposition is silent, as, for example, to allow him to state to whom the witness pointed when identifying persons, the deposition being silent.³

Credence of deposition.—There is nothing in the code requiring other or different credence to be given to the deposition of a witness at the preliminary examination than is accorded to the sworn testimony of witness who appears personally in court.⁴

19. *People v. Johnson*, 13 Cal. App. 776, 110 Pac. 965 (holding that a promise of the sheriff and district attorney to attempt to serve the subpoena does not affect the rule).

20. *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Pasqueria*, 30 Cal. App. 625, 159 Pac. 173. See DEPOSITIONS.

1. *People v. Pasqueria*, 30 Cal. App. 625, 159 Pac. 173.

2. *People v. Garnett*, 9 Cal. App. 194, 98 Pac. 247.

3. *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467.

4. *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480.

XIV. DOCUMENTARY AND BEST AND SECONDARY EVIDENCE.

§ 219. **In General.**—Before documentary evidence is receivable, preliminary proof should be made that it is genuine and what it purports to be,⁵ and it has been held that the mere statement of counsel offering such evidence is insufficient to justify its admission.⁶ In a case where a municipal ordinance was introduced in evidence, it was presumed that the ordinance continued to exist, and that it was not necessary for the state to prove the negative fact that it had not been repealed.⁷ When an instrument is received in evidence and its contents pointed out and referred to by witnesses and counsel, it cannot be maintained that its contents were not fully in evidence before the jury even though it was not read to the jury when admitted.⁸ If there are no technical words in a document requiring interpretation, the court may refuse to permit a witness to tell its meaning.⁹ A memorandum made by a witness, is not admissible as original evidence,¹⁰ although it may be used to refresh his memory.¹¹ It is elsewhere pointed out that a city directory may be admitted in evidence on the question of the fictitious character of a name.¹²

§ 220. **Entries Generally.**—Evidence of entries in books made by persons other than the defendant himself is inadmissible against him unless there is proof connecting him

5. *People v. Pera*, 36 Cal. App. 292, 171 Pac. 1091. See EVIDENCE.

6. *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310, holding an anonymous letter not proved to have been intended for the defendant and not received by him because intercepted, inadmissible against him. See *People v. Lee*, 36 Cal. App. 323, 172 Pac. 158.

7. *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590.

8. *People v. Imamura*, 26 Cal. App. 432, 147 Pac. 219.

9. *People v. Yakum*, 118 Cal. 437, 50 Pac. 686.

10. *People v. Quinn*, 18 Cal. 122; *People v. Elyea*, 14 Cal. 144; *People v. Lanterman*, 9 Cal. App. 674, 100 Pac. 720 (conductor's report of passes and free transportation).

11. See WITNESSES.

12. See *supra*, § 177.

in some way with the making or with knowledge of such entries. In the absence of such proof the entries are purely hearsay,¹³ and can be admitted only under some exception to the hearsay rule. The rule that entries are admissible when made at or near the time of the event in the ordinary course of business by a decedent who knew the fact and had no interest in making a false entry¹⁴ applies only where this evidence is offered as proof of the fact recited. It has no application when the purpose of the evidence is to show that the defendant did not keep correct books, but that they were falsified to enable him to commit the crime. In that event the entries are admissible only as admissions or acts done in furtherance of the crime charged, and his knowledge and complicity in falsifying the books must first be shown. It is not enough that it is the defendant's duty to know their contents, as the presumption of innocence is sufficient to overcome the presumption which might prevail in a civil case, that he knew because it was his duty to know.¹⁵

§ 221. Entries in Bible.—An entry in a family Bible is not admissible simply because of the place where it is made. It is hearsay evidence and subject to the general rule by which that class of evidence is governed. When the entrant is deceased, the entry is admissible as evidence of pedigree.¹⁶ Although the term "pedigree" includes the fact of birth, marriage and death, a case is not necessarily one of pedigree, because these questions are incidentally inquired into.¹⁷ And upon a question as to date of birth, the entry is not admissible as evidence of

13. *People v. Leonard*, 106 Cal. 302, 39 Pac. 617 (where there was proof of defendant's knowledge, and the entry was held properly admitted); *People v. Martel*, 21 Cal. App. 573, 132 Pac. 600; *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428 (holding that defendant's knowledge was sufficiently shown).

14. See Code Civ. Proc., § 1946. And see EVIDENCE.

15. *People v. Blackman*, 127 Cal. 248, 59 Pac. 573.

16. Code Civ. Proc., § 1870, subd. 13. See EVIDENCE.

17. *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.

the fact when persons having actual knowledge thereof are alive and can be and are produced in court.¹⁸ But it may be used to refresh the memory of a witness.¹⁹ The admissibility of the book does not depend upon proof of handwriting or authorship but upon proof that it was the family Bible. Consequently, the fact that a witness is unable to read or write the language in which the entries are made does not affect its admissibility.²⁰

§ 222. Maps, Diagrams and Models.—Diagrams and models of the scene of the crime having no tendency to convey false impressions of the real conditions of the premises may be used for the purpose of making the testimony more clearly understood.¹ The fact that the diagram or model does not represent a complete reproduction of the place to be illustrated does not preclude its use where it speaks the truth as far as it goes and only fails to show certain objects not material or important to the inquiry at hand.² Indeed, it has been held that a diagram may be used without proof of its correctness if it is not actually introduced in evidence, as in such case it is merely used for purpose of explanation just as the witness might have used a book, a board, or a piece of paper, for the same purpose.³ It has been held that there is no

18. *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303. Compare *People v. Slater*, 119 Cal. 620, 51 Pac. 957, holding that a family Bible was properly admitted upon a question of age. It appears from this case, however, that the testimony of the parents was sufficient without the family record.

19. *People v. Vann*, 129 Cal. 118, 61 Pac. 776. See WITNESSES.

20. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915.

1. *People v. Schoon*, 177 Cal. 678, 171 Pac. 680; *People v. Watson*, 165 Cal. 645, 133 Pac. 298; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202; *People v. Pera*, 36 Cal. App. 292, 171 Pac. 1091 (holding a copy of an official map to have been properly introduced); *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407. And see EVIDENCE.

2. *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407.

3. *People v. Murphy*, 39 Cal. 52.

objection to a diagram drawn by the prosecuting attorney in the presence of the jury, and verified by a witness as correct.⁴ Nor is there objection to a diagram representing the position of objects at the time of the arrival of a witness shortly after the commission of the crime. This has a tendency to show their position when the crime was committed, notwithstanding the possibility that they were moved before his arrival.⁵

§ 223. Photographs in General.—In the discretion of the trial court, a photograph, shown to be a correct representation of the objects sought to be shown,⁶ may be used to show particular locations or objects where it is important that the jury should have a clear idea thereof, and the situation may thus be better indicated than by the testimony of witnesses, or where a better or clearer understanding of such testimony may be thus given.⁷ Photographs are admissible, not as evidence of what in fact occurred, but for the purpose of illustration,⁸ or as an appropriate aid to the jury in applying the evidence.⁹ They are admissible, when properly authenticated, just as are illustrative charts.¹⁰

The time of its taking is immaterial if the photograph is shown to be a correct reproduction.¹¹ In laying the

4. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202.

5. *People v. Shears*, 133 Cal. 154, 65 Pac. 295.

6. *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

7. *People v. Rogers*, 163 Cal. 476, 126 Pac. 143; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Northcott*, 31 Cal. App. Dec. 346, 189 Pac. 704 (photographs of place where body of deceased was found, and of the body of the deceased); *People v. Balestieri*, 23 Cal. App. 708, 139 Pac. 821. See

ARSON, vol. 3, p. 171, as to photograph of building taken shortly after a fire. And see EVIDENCE.

8. *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694; *People v. Clapp*, 26 Cal. App. 523, 147 Pac. 469.

9. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

10. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720.

11. A photograph of the victim of a crime shown to be a fair representation of him at the time of his disappearance is admissible, though taken several years before

foundation for the introduction of a photograph, it is not necessary to call the photographer who finished the picture from a negative given him by another.¹²

§ 224. Rule Applied.—It is common practice to introduce photographs of the scene of the crime, when shown to be correct reproductions of what they purport to represent. The fact that there may be an uncertainty as to the position of some of the articles will not render a photograph incompetent if their exact position is not important.¹³ A photograph is not inadmissible because certain places are marked thereon as pointed out by witnesses,¹⁴ or because it discloses the presence of certain objects placed upon the ground by a witness to indicate the location of objects at the time he visited the scene,¹⁵ or because it contains the body of a person posed in the position shown by the evidence to have been the position of the victim of the assault after he fell to the ground.¹⁶ Such evidence is no more hearsay than any evidence of a surveyor who makes a diagram to illustrate some theory of a case. Nor is it objectionable as evidence manufactured by the prosecution.¹⁷

Photographs are also admissible to show the nature and extent of the wounds inflicted upon the victim of the crime,¹⁸ even though their effect may be to awaken feel-

that time, *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

12. *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035.

13. *People v. Grill*, 151 Cal. 592, 91 Pac. 515.

14. *People v. Crandall*, 125 Cal. 129, 57 Pac. 785.

15. *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694.

16. *People v. Clapp*, 26 Cal. App. 523, 147 Pac. 469. Compare *People v. Maughs*, 149 Cal. 253, 86 Pac. 187, holding it error to admit a

picture of a porch with a body lying in the assumed position in which the deceased's body was found, where neither the man who took the photograph nor the man who represented the dead body ever saw the body of the dead man on the porch.

17. *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Crandall*, 125 Cal. 129, 57 Pac. 785.

18. *People v. Rogers*, 163 Cal. 476, 126 Pac. 143; *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917; *People v. Saenz*, 33 Cal. App.

ings of horror and indignation in the minds of the jury.¹⁹ While it may be that a photograph should not be admitted when it appears that probes were inserted in the wounds subsequently to their infliction,²⁰ photographs showing a cut sewed up as it appeared prior to the death of the victim, and showing it held apart so as to disclose the depth of the incision have been held admissible.¹

Where the genuineness of a signature is in question, photographs of signatures may be admitted in evidence.²

§ 225. Best and Secondary Evidence.—There can be no evidence of the contents of a writing, other than the writing itself except in the five cases mentioned in section 1855 of the Code of Civil Procedure.³ In accordance with this rule the record thereof is the best evidence of a commitment⁴ or of a judgment of conviction,⁵ although under the code, it is allowable, upon cross-examination, to ask a witness if he has not been convicted of a felony.⁶ The best evidence rule does not prohibit one from showing a record to a witness and asking him if he signed it, as this is not an effort to prove the contents thereof by parol.⁷

Dec. 805, 195 Pac. 442 (the picture serves to corroborate testimony as to the actual infliction of the number, character of the blows and their location, to aid in the comprehension of expert testimony, and to identify the deceased); *People v. Northeott*, 31 Cal. App. Dec. 346, 189 Pac. 704; *People v. Balestieri*, 23 Cal. App. 708, 139 Pac. 821.

19. *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442; *People v. Northeott*, 31 Cal. App. Dec. 346, 189 Pac. 704; *People v. Balestieri*, 23 Cal. App. 708, 139 Pac. 821.

20. *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694.

1. *People v. Elmore*, 167 Cal. 205, 138 Pac. 989.

2. *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Driggs*, 14 Cal. App. 507, 112 Pac. 577.

3. See *infra*, this section. And see EVIDENCE.

4. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *People v. Finley*, 153 Cal. 59, 94 Pac. 248.

5. *People v. McDonald*, 39 Cal. 697; *People v. Melvane*, 39 Cal. 614; *People v. Reinhart*, 39 Cal. 449.

6. *People v. Sears*, 119 Cal. 267, 51 Pac. 325. See WITNESSES, as to impeaching witnesses by proof of previous conviction.

7. *People v. Donovan*, 43 Cal. 162.

Nor does it preclude oral evidence describing a writing when the evidence is offered for the purpose of identifying it.⁸ The deposition of a witness at a preliminary examination (even in cases where such testimony is required to be reduced to writing) is not the best or only evidence of what the witness swore to. Thus, statements voluntarily made by a defendant at his preliminary examination may be testified to by a person present at the hearing.⁹ So also if the witness is afterwards prosecuted for perjury committed at the preliminary examination, the prosecution may at the trial prove by oral evidence what he swore to.¹⁰ And the fact that a defendant registered at a hotel under a false name may be proved by parol testimony, when it is the fact of signing, and not the name signed that is material.¹¹ In prosecutions for crimes relating to the property of a corporation, its corporate character is material only as a matter of description, not as an element of the crime, and may be proved by general reputation,¹² or by parol evidence that it was acting as a corporation.¹³ An arrest does not necessarily imply that there is any record evidence of the arrest and so it may be proved by parol.¹⁴ And testimony as to the condition of the victim's clothing immediately after the commission of the crime is not objectionable upon the ground that it is not the best evidence. The clothes themselves are not the best evidence, or indeed any evidence, standing alone, of their condition immediately after the outrage.¹⁵

8. *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

9. *People v. Shortridge*, 179 Cal. 507, 177 Pac. 458.

10. *People v. Curtis*, 50 Cal. 95.

11. *People v. Ferrara*, 31 Cal. App. 1, 159 Pac. 621.

12. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Ah Sam*, 41 Cal. 645.

13. *People v. Barric*, 49 Cal. 342; *People v. Hughes*, 29 Cal. 257; *People v. Frank*, 28 Cal. 507; *People*

v. Patterson, 42 Cal. App. 37, 183 Pac. 209. See CORPORATIONS, vol. 6, p. 667.

14. *People v. Manning*, 48 Cal. 335. But see *People v. Suellie*, 1 Cal. Unrep. 685, holding that the presumption is that when a person is put in jail on a criminal charge, the accusation is in writing, which in such case would constitute the best evidence of the fact.

15. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202.

Secondary evidence of the contents of a private writing may be admitted after proof of the execution of the original, and proof of its loss or destruction.¹⁶ When a document is in the possession of the accused, secondary evidence of its contents may be given if he fails to produce it after notice to do so. The shortness of the notice given does not affect the right to give secondary proof, if the refusal of compliance is not placed upon the ground that more time is necessary in which to comply, but solely upon the ground that the statute allows more time.¹⁷

It is a violation of defendant's constitutional right forbidding his being called upon to be a witness against himself, for the prosecuting attorney in the presence of the jury to demand that he produce documents.¹⁸ If the defendant objects to testimony as secondary and incompetent and thereby prompts the district attorney to demand that the defendant produce the documents, the defendant is not in a position to claim prejudice on account of such demand.¹⁹ When it is necessary to prove the results of voluminous facts or of the examination of many books and papers and the examination cannot be conveniently made in court, the results may be proved by a person who made the examination.²⁰

XV. DEMONSTRATIVE EVIDENCE.

§ 226. In General.—"Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may

16. *People v. Hust*, 49 Cal. 653; *People v. Glenn*, 10 Cal. 32; *People v. Walton*, 35 Cal. App. Dec. 316, 199 Pac. 824. See *LOST INSTRUMENTS*.

17. *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305.

18. *People v. Dufur*, 34 Cal. App. 644, 168 Pac. 590. See *infra*, § 593.

19. *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661.

20. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Kawano*, 38 Cal. App. 612, 177 Pac. 174.

be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court."¹ Pursuant to this code section it has been held permissible to introduce in evidence the following articles: a board with a bullet hole in it,² the instruments with which the crime was committed, weapons and bullets,³ the wearing apparel of the defendant, and of the victim of the crime,⁴ the property of the defendant found near the scene of the crime,⁵ articles and clothing of the victim of the crime found in the possession of the defendant,⁶ and stolen property found in his possession.⁷ Upon a prosecution for unlawful fishing, samples of fish caught by and taken from the defendant may be admitted in evidence.⁸ To show by comparison the character of the footprints at the scene of the crime, it is permissible to produce a box of sand of the same quality and character as that at the scene of the crime containing shoe tracks made with the shoes of the defendant.⁹

Writings for comparison.—"Evidence respecting the handwriting may also be given by comparison, made by the witness or by the jury, with writings admitted or treated as genuine by the party against whom the evi-

1. Code Civ. Proc., § 1954.

2. *People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520.

3. See *infra*, § 228.

4. See *infra*, § 229.

5. *People v. Wood*, 145 Cal. 659, 79 Pac. 367 (tin cans, a spoon, a hat and other articles commonly found about a camp held admissible).

6. *People v. Antony*, 146 Cal. 124, 79 Pac. 858 (where a trunk used by the defendant and his wife containing the blood-stained garments of the deceased was admitted in evidence); *People v. Westlake*, 134 Cal. 505, 66 Pac.

731 (the garments of deceased in defendant's possession are admissible); *People v. Piggott*, 126 Cal. 509, 59 Pac. 31; *People v. Smith*, 106 Cal. 73, 39 Pac. 40.

7. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45. See *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325, where the hide of a steer which was the subject of a larceny and a diagram of the brand of the owner were admitted. See BURGLARY, vol. 4, p. 744, and see LARCENY.

8. *People v. Ah Him*, 14 Cal. App. 280, 111 Pac. 627.

9. *People v. Searcey*, 121 Cal. 1, 41 L. R. A. 157, 53 Pac. 359.

dence is offered, or proved to be genuine to the satisfaction of the judge."¹⁰ In proving the genuineness of a handwriting submitted for comparison, the circumstances under which the writing was made should not be proved when irrelevant to establish the charge upon which the defendant is being tried, and where such evidence tended to connect the defendant with a previous attempt to commit a similar offense.¹¹

§ 227. Preliminary Proof Generally.—Before an article is introduced in evidence, it must be identified.¹² The identification of an article of a defendant found at the scene of the crime as being seen in his possession shortly prior to the commission of the crime is sufficient to justify its admission in evidence.¹³ The identification of goods stolen from a store is sufficient where some are positively identified and others are shown to be of a similar brand and make to those handled in the store burglarized in common with other stores.¹⁴ Suppositories to prevent conception and the like are sufficiently identified by proof that they were given the witness by the defendant, and that those which were produced had been given by her to the district attorney.¹⁵ If the suppositories were found in the possession of the defendant, they may be admitted on proof that the witness found them in the same place where the defendant got them when he committed the crime and were like those used at that time.¹⁶ Locks of

10. Code Civ. Proc., § 1944; *People v. Bibby*, 91 Cal. 470, 27 Pac. 781 (other writings are admissible for comparison in a forgery case). See *supra*, § 224, as to photographs of writings. See EVIDENCE.

11. *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082.

12. *People v. Lytle*, 34 Cal. App. 360, 167 Pac. 552; *People v. Ferns*, 27 Cal. App. 285, 149 Pac. 802 (holding the stolen property was

sufficiently identified by the prosecuting witness as his property).

13. *People v. Rowell*, 133 Cal. 39, 65 Pac. 127.

14. *People v. Wing*, 23 Cal. App. 50, 137 Pac. 47.

15. *People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812.

16. *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945, citing *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612.

hair of the victim of a crime may be introduced in evidence, without proof showing their condition to be the same as when taken from the scene of the crime, as it is not presumed they have been changed in any way for any purpose.¹⁷

§ 228. Weapons and Instruments of Crime.—The weapons, bullets and other instruments of crime may be admitted in evidence¹⁸ when they are identified *prima facie* as those with which the crime was committed.¹⁹ They may be admitted to show as accurately as possible the means employed, and the manner in which the crime was committed,²⁰ or to corroborate a witness as to the circumstances of the crime,¹ or to connect the defendant with the crime,² or to prove intent.³ It is not required

17. *People v. Wolff*, 182 Cal. 728, 190 Pac. 22.

18. *People v. Mooney*, 177 Cal. 642, 171 Pac. 690; *People v. Ung Sing*, 171 Cal. 83, 151 Pac. 1145 (pistol and cartridges); *People v. Carson*, 155 Cal. 164, 99 Pac. 970 (knives); *People v. Donnolly*, 143 Cal. 394, 77 Pac. 177 (club); *People v. Morales*, 143 Cal. 550, 77 Pac. 470 (where the fatal bullet with a small piece of tin attached thereto was admitted, as well as the pistol of the same pattern as that of the deceased); *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101 (gun with which homicide was committed); *People v. Hill*, 123 Cal. 571, 56 Pac. 443; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51 (revolver, its holster and cartridges); *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457 (bloody rock found near scene of the crime); *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac.

951 (holding that a pistol probably used by the defendant was admissible although another claimed to be the owner).

19. *People v. Miller*, 177 Cal. 404, 170 Pac. 817 (identification of revolver held sufficient); *People v. Szafesur*, 161 Cal. 636, 119 Pac. 1083; *People v. Byrne*, 160 Cal. 217, 116 Pac. 521 (pistol); *People v. Foo*, 112 Cal. 17, 44 Pac. 453 (pistol and contents). See *People v. Hope*, 62 Cal. 291, holding admission of articles was not error where a witness had already testified without objection to their discovery.

20. *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971 (buggy shaft covered with blood stains found at scene of crime).

1. *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390.

2. *People v. Bishop*, 134 Cal. 632, 66 Pac. 976.

3. *People v. Carson*, 155 Cal. 164, 99 Pac. 970.

that the instrument be identified with certainty,⁴ and there need be no positive evidence that it was used by the defendant, if the circumstances are sufficient to justify the inference it was so used.⁵ A club found at the scene of the crime is insufficiently identified where the only testimony in relation thereto is to the effect that the blow must have been made by a large, smooth instrument and could have been produced by such a stick.⁶ But the presence of blood marks or other signs connecting it with the encounter would make it admissible.⁷ And a knife was sufficiently identified where the witness, in response to the question whether it was the knife with which the assault was committed, replies, "Yes, that's the knife."⁸ If the defendant admits that he had such a weapon as that introduced, and there is testimony that he used it, a failure to identify it is harmless.⁹ The time of the discovery of the weapon, and the fact that the defendant was not in actual occupancy of the premises at the time of the discovery, go to the probative force of the evidence, not to its admissibility.¹⁰

Tools and instruments of crime found in the possession of or under the control of the defendant soon after the commission of the offense may be offered in evidence

4. *People v. Szafcsur*, 161 Cal. 636, 119 Pac. 1083.

5. *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51 (the inability of a witness to say definitely whether the aperture in the body of the deceased was of the size made by a 32 or 38 caliber bullet, or whether the bullet was fired before or after death is not a ground for the exclusion of a revolver, as this is a question for the jury); *People v. Gilman*, 43 Cal. App. 453, 185 Pac. 310.

6. *People v. Hill*, 123 Cal. 571, 56 Pac. 443.

7. *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971; *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957. See *People v. Eantosca*, 37 Cal. App. 515, 174 Pac. 71, holding the evidence was sufficient to show that a club and shovel were found at the place where the assault occurred.

8. *People v. Rader*, 24 Cal. App. 477, 141 Pac. 958.

9. *People v. Grandi*, 33 Cal. App. 637, 165 Pac. 1027.

10. *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51. See *infra*, § 229, application of rule where wearing apparel is offered in evidence.

whenever they constitute a link in the chain of circumstances which tend to connect him with the commission of the offense charged.¹¹ But before they can be received in evidence, it must be shown that the crime charged was in fact committed, and that it was committed with the aid of instruments like those proposed to be shown in evidence, and that the defendant was in the vicinity at or about the time the offense was committed.¹² If there is no connection between the tools or instruments and the crime charged, they are irrelevant. For example, if it appears from the evidence that a burglary was committed without the aid of burglarious tools, tools found in the possession of the defendant, would be inadmissible.¹³ So also a pistol taken from the defendant several days after the commission of an act of rape is not admissible in evidence upon a prosecution for rape.¹⁴ It seems that it is immaterial that the instrument was taken from the defendant by force.¹⁵

§ 229. Articles of Clothing.—Wearing apparel of the accused is admissible in evidence, provided some connection between it and the accused, and between it and the supposed crime is shown.¹⁶ But where such articles of cloth-

11. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92 (pistol found near the spot where the defendant was taken into custody); *People v. Weston*, 169 Cal. 393, 146 Pac. 871 (a revolver found in a place to which the defendant had access is admissible); *People v. Sansome*, 84 Cal. 449, 24 Pac. 143 (burglars' tools found in possession of defendant soon after commission of offense); *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65 (tools in possession of defendant's mistress). See *BURGLARY*, vol. 4, p. 744.

12. *People v. Sansome*, 84 Cal. 449, 24 Pac. 143; *People v. Hope*,

62 Cal. 291; *People v. Winters*, 29 Cal. 658.

13. *People v. Winters*, 29 Cal. 658.

14. *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

15. *People v. Abbott*, 2 Cal. Unrep. 383, 4 Pac. 769, per McKinstry, J., concurring. See *supra*, § 178.

16. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92 (bloody clothes found near where defendant was taken into custody); *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035 (overcoat worn by accused when arrested shown to have been worn by

ing found at the scene of the crime are not traced to the defendant, they are not admissible, for it has been said to be a well-known fact that there is a general tendency, when an object is produced as proving something to assume on sight of the object all else that is asserted about it.¹⁷ Garments admissible under this rule are not rendered incompetent as evidence by reason of the fact that they were not found until some time after the commission of the crime charged, or that the defendant was not in control of the premises at the time of their discovery. These objections go to their weight as evidence, rather than to their admissibility.¹⁸

Garments of victim.—The production of the garments worn by the victim at the time of the commission of an assault upon him is a matter of common practice.¹⁹ It has been held that clothing is admissible as part of the *res gestae*.²⁰ It is frequently important evidence tending to corroborate testimony as to the manner in which the injuries were made,¹ or tending to prove the violence of the blow and the course, location or char-

him on the day of the crime); *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (holding it not error in a larceny case to admit the coat worn by the defendant when arrested); *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318; *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466; *People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676 (bloody clothes).

17. *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466, per Burnett, J.

18. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318.

19. *People v. Schoon*, 177 Cal. 678, 171 Pac. 680 (where a pair of gloves in a pocket of the clothing of the deceased was admitted);

People v. Durrant, 116 Cal. 179, 48 Pac. 75; *People v. Hawes*, 98 Cal. 648, 33 Pac. 791 (where a vest taken from the deceased's body after it had lain in the grave over five months was admitted); *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597; *People v. Hong Ah Duck*, 61 Cal. 387 (bloody shirt of deceased); *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102, 1114.

20. *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Hong Ah Duck*, 61 Cal. 387. See *supra*, § 193.

1. *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102, 1114.

acter of the bullet or knife wounds.² And if the garments of the victim were found in the possession of the accused, they are admissible as tending to connect him with the commission of the crime.³ The fact that the evidence may have a tendency to prejudice the jury against the defendant does not go to its competency.⁴ To warrant the admission of such evidence there should be preliminary proof identifying the garments as those of the victim of the crime,⁵ and showing that they are in the same condition, when offered, as they were at the time of its commission, especially as to the particular point toward which the evidence is directed,⁶ or else satisfactorily explaining the changes that have taken place.⁷ It has been held not to be error to drape the clothing upon a dressmaker's frame which itself is not in evidence.⁸

When a defendant assaults two persons at the same time and is being prosecuted for an assault upon one of them, the garments of the other are admissible in corroboration of his testimony.⁹

§ 230. Persons.—When the paternity of a child is in question, the child may be exhibited to the jury to give them an opportunity to compare its appearance with that of the defendant.¹⁰ This would appear to be true regard-

2. *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Knapp*, 71 Cal. 1, 11 Pac. 793.

3. See *supra*, § 226.

4. *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102, 1114. See *supra*, § 177.

5. *People v. Westlake*, 134 Cal. 505, 66 Pac. 731 (identification by laundry mark held sufficient).

6. *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150 (holding the failure to make preliminary proof was not prejudicial under the circumstances). See *Peo-*

ple v. O'Brien, 78 Cal. 41, 20 Pac. 359, holding proof was waived by a failure to object.

7. *People v. Besold*, 154 Cal. 363, 97 Pac. 871. See *HOMICIDE*.

8. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

9. *People v. Manasse*, 153 Cal. 10, 94 Pac. 92.

10. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20 (prosecution for furnishing woman with medicine to procure miscarriage); *People v. Todd*, 26 Cal. App. 291, 146 Pac. 899 (a rape case); *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435

less of the age of the child.¹¹ Taken by itself, proof of such resemblance is insufficient to establish paternity, but it is clearly a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass.¹² The objection to such exhibition, therefore, goes to the weight of the evidence rather than to its relevancy or competency. The exhibition of the child may also be proper for other purposes; for example, in corroboration of testimony that it was born fully matured and perfect.¹³ But upon a prosecution for a sexual crime, in which proof is made of other acts of intercourse than that constituting the offense, it is not permissible to exhibit a child born of some one of the collateral acts of intercourse.¹⁴

Requiring accused to identify himself.—While under the constitution a defendant cannot be compelled to be a witness against himself,¹⁵ it is not an infringement of this right to require him to stand up for identification as the person referred to by a witness upon the stand.¹⁶

XVI. OPINION EVIDENCE.

Opinions of Ordinary Witnesses.

§ 231. In General.—It is a general rule that the testimony of a witness must be limited to the facts of which he has personal knowledge, and that he must not give his individual opinion thereon.¹⁷ This rule does not require

(prosecution for exploding dynamite at dwelling of prosecutrix). See ILLEGITIMACY.

11. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20, where child was five and a half months old.

12. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

13. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20.

14. *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420.

15. See WITNESSES.

16. *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Ferns*, 27 Cal. App. 285, 149 Pac. 802.

17. *People v. Worden*, 113 Cal. 569, 45 Pac. 844 (whether a third

that a witness shall testify with that certainty which excludes all doubt from his mind.¹⁸ On the contrary, any lack of positiveness about a fact to the existence of which he is testifying goes to the weight, rather than to the admissibility of his testimony.¹⁹ Accordingly, the use of the word "presume" by a witness is not objectionable when it evidently means nothing more than a statement of his best recollection of a fact observed.²⁰

§ 232. Illustrations of Opinions.—By virtue of the rule excluding opinions of ordinary witnesses, such a witness cannot give his opinion whether a person is guilty or innocent of the charges against him,¹ whether one person has an influence over another,² or whether or not there was any secrecy in connection with the actions of the defendant.³ He cannot state his conclusion from the manner in which one runs a business, whether or not he was manager and had full control.⁴ Neither can he testify to his understanding of the meaning of words used by another, or to inferences drawn by him from a combination of circumstances tending to throw light on the question of feeling between two persons. That is a matter for the jury upon proof of the words or circumstances them-

person would have seen an object in a particular situation is not a question to be determined by the opinion of a witness); *People v. Ah Own*, 85 Cal. 580, 24 Pac. 780; *People v. Dean*, 35 Cal. App. Dec. 128, 199 Pac. 561; *People v. Sue Chung Kee*, 26 Cal. App. 732, 148 Pac. 529; *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513; *People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579; *People v. Newton*, 11 Cal. App. 762, 106 Pac. 247. See EVIDENCE.

18. *People v. Soap*, 127 Cal. 408, 59 Pac. 771.

19. *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Young*, 102 Cal. 411, 36 Pac. 770; *People*

v. Rolfe, 61 Cal. 540; *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766. See *supra*, §§ 153, 163.

20. *People v. Soap*, 127 Cal. 408, 59 Pac. 771. See note, 4 A. L. R. 979, as to effect of witness qualifying his testimony with "I think," "I believe" or the like.

1. *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082; *People v. Darr*, 3 Cal. App. 50, 84 Pac. 457.

2. *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382.

3. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

4. *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

selves.⁵ So also a defendant may not show that the sheriff suspected another of the crime charged, as such testimony involves the expression of the mere opinion of the sheriff.⁶ But a statement of an officer that he arrested or directed the arrest of the defendant is not objectionable as an expression of opinion of guilt.⁷ A description of a wound is a statement of fact, not an expression of opinion.⁸ Accordingly, one who has examined a wound may testify as to its position, the course taken by a bullet, and its place of entrance and exit.⁹ So also an ordinary witness may describe a bullet mark upon a building, whether diagonal or straight into the wood.¹⁰ And he may testify as to the character of a house.¹¹

§ 233. Exception to Rule.—The border line between fact and an opinion is often very indistinct, and the statement of a fact is frequently only the opinion or conclusion of the witness.¹² Sometimes facts are made up of a great variety of circumstances and a combination of appearances, which from the infirmity of language, cannot be properly described, except by permitting a witness who observed them to state his conclusion.¹³ The result of such observation should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the

5. *People v. French*, 69 Cal. 169, 10 Pac. 378.

6. *People v. Malone*, 25 Cal. App. 764, 145 Pac. 550. See *supra*, § 185.

7. *People v. Ward*, 105 Cal. 335, 38 Pac. 945.

8. *People v. Gibson*, 106 Cal. 458, 39 Pac. 864; *People v. Hong Ah Duck*, 61 Cal. 387.

9. *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150; *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384

(where the examination was made by a physician).

10. *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

11. *People v. Lock Wing*, 61 Cal. 380.

12. *People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579. See *EVIDENCE*.

13. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829.

observation of others. Such a conclusion approaches knowledge and is knowledge so far as the imperfection of human nature will permit knowledge of these things to be acquired; and consequently it cannot be said to be an expression of the mere opinion of the witness in the objectionable sense.¹⁴ It is indispensable, however, that such a conclusion be based upon the witness' own observation. He should not be permitted to testify to an impression which might have been produced by what he had heard other persons than the accused say.¹⁵

§ 234. What Opinions are Admissible.—Under the rule that certain conclusions of witnesses are admissible in evidence,¹⁶ an ordinary witness may testify as to the identity of persons when his testimony is based upon a personal knowledge of the person identified and is the result of his recollection of the person and the facts connected with his seeing or hearing him.¹⁷ He may also give his judgment of size, weight, color, quantity, distance and time.¹⁸ He may give his estimate of a distance, although he has not actually measured it.¹⁹ A nonexpert witness may testify as to his impressions of the nature and location of sounds, as, for example, whether shots sounded as though fired inside of a building or in the open air or that they sounded like a drum or something deep. Such evidence is simply a statement as to the nature of the impressions of sound left upon the ear and is not

14. *People v. Sanford*, 43 Cal. 29.

15. *People v. Gray*, 148 Cal. 507, 83 Pac. 707; *People v. Wreden*, 59 Cal. 392.

16. See *supra*, § 233.

17. *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *People v. Gray*, 148 Cal. 507, 83 Pac. 707.

18. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Helm*, 152 Cal. 532, 93 Pac. 99

(holding that opinion as to width of wheel tracks is admissible).

19. *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *People v. Alviso*, 55 Cal. 230. See *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868 (holding that exclusion of evidence was not prejudicial where it appeared that the witness had formed no judgment as to the distances sought to be shown).

opinion evidence.²⁰ Likewise, a witness may testify that there was fresh blood on a coat;¹ that certain stains were moss stains;² and when he has a general knowledge of the cost or value of certain articles, he may testify as to their value.³ Also, when he has seen a person write, he may state his belief or opinion whether a particular writing was made by such person.⁴ In like manner a post-office inspector may give his opinion of the genuineness of a postal mark in connection with his statement of the facts upon which it is based.⁵ It has been held that one may testify from his observation of another, that she was chaste and virtuous.⁶ And it may be that one with an extended acquaintance with opportunities for observation and proper tests would be a competent witness to give an opinion as to the inability of another to speak or understand a given language.⁷ But an objection is properly sustained to a question which calls for an opinion of a witness as to a matter within the exclusive province of the jury to determine.⁸

§ 235. Appearance, Demeanor and Age.—Any witness may be permitted to describe the tone, gesture, appearance and the general demeanor of a person, although he cannot do so without in some degree indicating his own opinion or expression of what they were.⁹ This is but to describe an outward manifestation drawn from observed

20. *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697.

1. *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295.

2. *People v. Nunley*, 142 Cal. 105, 75 Pac. 676.

3. *People v. Dufur*, 34 Cal. App. 644, 168 Pac. 590.

4. *People v. McLeod*, 30 Cal. App. 435, 158 Pac. 506.

5. *People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579.

6. *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

7. *People v. Klempke*, 19 Cal. App. 672, 127 Pac. 653, holding that a witness who has but a limited acquaintance with the defendant and a limited means of observation is not competent to give an opinion as to whether the defendant can speak the English language.

8. *People v. Wright*, 93 Cal. 564, 29 Pac. 240.

9. *People v. Sanford*, 43 Cal. 29.

facts;¹⁰ and it does not fall within the rule requiring the witness to be an intimate acquaintance to be competent to testify.¹¹ A witness, although not an expert, who details a conversation between himself and another, may also in connection therewith, state his opinion, belief or impression as to the state of the mind of such person as it seemed to him at the time of the conversation.¹² He may testify whether or not the appearance and manner of the person was rational or irrational, not only with respect to his actions but also with respect to his sayings;¹³ whether his state of mind was clear or confused;¹⁴ and whether he answered questions quickly and promptly.¹⁵ So also any witness may testify as to the demeanor of the defendant, whether he was intoxicated;¹⁶ or excited, and nervous;¹⁷ or pale,¹⁸ or angry or timid.¹⁹ Nor need such testimony always be confined to a special occasion. A witness may state whether a person was habitually melancholy, morose, peevish, irritable or the opposite;²⁰ or whether he was totally lacking in mentality or a raving maniac.¹ A non-

10. *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177.

11. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Lavelle*, 71 Cal. 351, 12 Pac. 226. See *infra*, § 236, as to opinions of intimate acquaintances,

12. *People v. Wreden*, 59 Cal. 392; *People v. Sanford*, 43 Cal. 29.

13. *People v. Bostic*, 167 Cal. 754, 141 Pac. 380; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Lavelle*, 71 Cal. 351, 12 Pac. 226; *People v. Vaughn*, 14 Cal. App. 201, 111 Pac. 620.

14. *People v. Sanford*, 43 Cal. 29.

15. *People v. Loomis*, 170 Cal. 347, 149 Pac. 581.

16. *People v. Hill*, 123 Cal. 47, 55 Pac. 692; *People v. Arrighini*, 122

Cal. 121, 54 Pac. 591; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Montieth*, 73 Cal. 7, 14 Pac. 373.

17. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

18. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Sprague*, 35 Cal. App. Dec. 13, 198 Pac. 820.

19. *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

20. *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

1. *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591. See *infra*, § 236, as to opinion of an intimate acquaintance as to the sanity or insanity of a person.

expert witness may also give his opinion as to the age of a person.²

§ 236. Sanity or Insanity.—It is provided in the Code of Civil Procedure that an opinion as to the sanity or insanity of a defendant can be given by an intimate acquaintance, the reason for the opinion being given.³ In the nature of things it is difficult to prescribe any measure of proof by which to determine whether a witness is an intimate acquaintance within the meaning of the code. The question is one of large discretion in the trial judge, and an appellate court will not interfere unless an abuse of discretion is clearly shown.⁴ The fact that a witness does not regard himself as an intimate acquaintance is not conclusive of the question.⁵ An acquaintance of more than several weeks may be more than sufficient, so far as time is concerned, to afford one the opportunity of forming an intelligent judgment of the condition of defendant's mind.⁶ And it is not necessary that the witness should have seen the defendant within several years of the time of the trial, although this fact may affect the weight

2. *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150.

3. Code Civ. Proc., § 1870, subd. 10; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204; *People v. Pico*, 62 Cal. 50. See *infra*, § 238, as to opinion of experts.

4. *People v. Niino*, 183 Cal. 126, 190 Pac. 626; *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177; *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People v. Hill*, 116

Cal. 562, 48 Pac. 711; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Fine*, 77 Cal. 147, 19 Pac. 269; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756; *People v. Vaughn*, 14 Cal. App. 201, 111 Pac. 620.

5. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073.

6. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073. See *People v. Clark*, 151 Cal. 200, 90 Pac. 549, where an acquaintance of four or five years who saw and talked with the defendant frequently was held an intimate acquaintance.

of his testimony.⁷ A warden, sheriff or jailer who has the custody of the defendant for some time and has observed him during that period is an intimate acquaintance within the rule.⁸ It has been held not improper to sustain an objection to the question, whether a person could reason as a sane man in reference to a particular topic, or whether the witness observed anything peculiar and unnatural in reference to a person claimed to be insane.⁹ Under this rule it has been held that a witness who had testified as to his opinion of the insanity of the defendant cannot be permitted to testify that he had expressed such opinion to third persons previously.¹⁰

Opinion of Experts.

§ 237. **In General.**—An expert has been defined to be a witness who testifies to conclusions from facts, while an ordinary witness testifies only as to the facts. This definition is not exact as no witness testifies to facts precisely as they exist. The true distinction, it has been said, is that the nonexpert testifies as to matter readily mastered by an adjudicating tribunal, whereas the expert testifies to conclusions outside of such range.¹¹ The rule as to the admission of expert opinion evidence is that such evidence may be given upon matters not coming within the common knowledge or experience of men, but not upon subjects which do not require special skill. These latter subjects

7. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720.

8. *People v. Delhantie*, 163 Cal. 461, 125 Pac. 1066 (where a warden had the custody of the defendant for three years); *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073 (where a jailer who received one into a county jail was held an intimate acquaintance); *People v. Vaughn*, 14 Cal. App. 201, 111

Pac. 620 (where an under-sheriff had the custody of the defendant for three months and had seen him twice daily).

9. *People v. Vaughn*, 14 Cal. App. 201, 111 Pac. 620.

10. *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204. See *supra*, § 185.

11. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70, quoting Wharton on Criminal Evidence.

are matters of common knowledge upon which the jury is as competent to pass as the witness.¹² However, the admission of expert testimony as to matters not the subject of expert evidence is harmless, if the testimony is not of such nature as to present to a jury a conclusion other than that which it might properly reach from other testimony in the case.¹³ And an expert witness may state facts coming under his own observation, although they may be such as do not call for expert testimony.¹⁴ The testimony of a witness that he knew certain tissues of the human body, and that he saw them in a vessel in defendant's possession is not expert testimony but testimony as to a fact.¹⁵

A court is not required to order the services of an expert witness in behalf of a defendant to be compensated for out of the public funds.¹⁶

§ 238. Subjects of Expert Testimony.—In accordance with the rule stated in the preceding section, expert opinion evidence has been held to be admissible upon such widely divergent subjects as the following: the condition of a person's mind, whether he was sane or insane;¹⁷ whether one was too ill to make a statement alleged to have been made by him;¹⁸ what was the proximate or approximate cause of death;¹⁹ whether different pieces of cloth are of the same texture and quality;²⁰ what is the

12. *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Lovren*, 119 Cal. 88, 51 Pac. 22, 638; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106. See EVIDENCE.

13. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676.

14. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

15. *People v. Thompson*, 16 Cal. App. 748, 117 Pac. 1033.

16. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457. See WITNESSES.

17. See *infra*, § 242. See *supra*, § 236, as to opinions of intimate acquaintances.

18. *People v. Brown*, 2 Cal. Unrep. 701, 13 Pac. 222.

19. *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

20. *People v. Lovren*, 119 Cal. 88, 51 Pac. 22, 638.

effect of certain acts in arousing the feelings or gratifying sexual passions;¹ what is a reasonable attorney's fee for certain services;² and the value of property.³ Likewise, a chemist may be permitted to give the result of a chemical analysis of compounds which are admissible in evidence;⁴ and an expert may testify as to their effect upon the human body.⁵ The right of either party, in a proper case, to introduce opinion evidence of experts as to the identity of disputed handwriting cannot be questioned.⁶ It has been said that the witness should not be asked as a fact whether the same person wrote both signatures, but whether he is of the opinion that the same person wrote both.⁷

Upon the other hand, the following have been held not to be the subject of expert testimony: whether certain marks on a cartridge indicate that it has been in a pistol, and whether a bullet is similar to that used in a certain gun;⁸ what is the most practicable method of removing rocks from a ditch;⁹ and whether the way to keep an inanimate object in position is to support it by props or stays.¹⁰ So also the meaning of statements and declarations of a defendant is not a matter of expert testimony, but is a question for the jury to be gathered from the rela-

1. *People v. Camp*, 26 Cal. App. 385, 147 Pac. 95. Compare *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24, where the court says the matter was probably not one calling for the expression of expert opinion.

2. *People v. Crane*, 34 Cal. App. 760, 168 Pac. 1055. See *ATTORNEYS AT LAW*, vol. 3, p. 713.

3. *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222. See *supra*, § 234, as to the rule that one not an expert may testify as to the value of property.

4. *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

5. *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

6. *People v. Lytle*, 34 Cal. App. 360, 167 Pac. 552. See *People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579, evidence held admissible.

7. *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

8. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106.

9. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

10. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

tion of the parties, the language used and the surrounding circumstances.¹¹

§ 239. **Wounds—Position of Parties.**—It is a well-established rule that a surgeon may state generally the sort of agency, means or instrument which may have produced a given injury;¹² as, for example, whether or not a wound was inflicted by a blunt or a cutting instrument,¹³ although he cannot state that it was caused by a particular instrument or by an instrument exhibited to him.¹⁴ So also an expert may testify to the degree of force employed to inflict the wound,¹⁵ the caliber of the bullets causing it,¹⁶ and the distance at which powder marks from a gun of a certain caliber would be noticeable on the flesh.¹⁷ But when the question at issue in a case is whether certain wounds were or were not accidentally inflicted, it is one of fact for the jury and not a proper one for expert testimony.¹⁸ While such testimony is frequently given by medical experts, it is not a class of knowledge which is in its nature so confined to men educated in the science of medicine or surgery as to preclude its acquisition by others.¹⁹

11. *People v. Moan*, 65 Cal. 532, 4 Pac. 545.

12. *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

13. *People v. Sullivan*, 2 Cal. Unrep. 552, 8 Pac. 520; *People v. Smith*, 2 Cal. Unrep. 59. See *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808 (holding that a physician could state whether an opening in a uterus could have been made by a hard rubber syringe). Compare *People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676, where it was held that the error, if any, in admitting such testimony was harmless.

14. *People v. Smith*, 2 Cal. Unrep. 59 (holding that a physician should not be permitted to give his opinion that a bruise was produced by one of three instruments, where it could have been produced by others also); *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

15. *People v. Knapp*, 16 Cal. App. 682, 117 Pac. 792.

16. *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833.

17. *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.

18. *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543.

19. *People v. Gibson*, 106 Cal. 458, 39 Pac. 864.

Relative positions of parties.—The relative position of the parties at the time of the commission of a crime involves no question of skill or science and is not a proper subject matter of expert testimony. When the position of the wound is given and the course taken by the bullet known, the jury is fully as competent to determine the relative position of the parties as a witness.²⁰

§ 240. Qualifications of Experts.—Before an expert witness can give his opinions upon any subject, it must be shown preliminarily that he is qualified to express it;¹ and to this end the court may allow the adverse party to cross-examine the expert.² But it may forbid any inquiry upon such examination into matters which are proper subjects for the examination in chief.³ The trial court has a broad and legal discretion in deciding whether an expert possesses the requisite qualifications, and a ruling rejecting a witness will not be disturbed unless it is clearly wrong.⁴ An appellate court will not disturb the ruling merely because, if at nisi prius, it would have allowed the witness to testify.⁵ A physician is not incompetent because of his small previous experience in the particular field in which his opinion is sought if he has specially studied the subject and is able to state not only his general opinion, but also the grounds upon which it is founded.⁶ But it has been held that a physician, as

20. *People v. Farley*, 124 Cal. 594, 57 Pac. 571; *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *People v. Hill*, 116 Cal. 562, 48 Pac. 711; *People v. Smith*, 93 Cal. 445, 29 Pac. 64; *People v. Westlake*, 62 Cal. 303; *People v. Smith*, 2 Cal. Unrep. 59, 4 Pac. C. L. J. 213; *People v. Gays*, 36 Cal. App. Dec. 351, 202 Pac. 43; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756. See *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384, distinguishing these cases.

1. *People v. Harris*, 169 Cal. 53, 145 Pac. 520. See EVIDENCE.

2. *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.

3. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612.

4. *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074; *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222.

5. *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074.

6. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

such, and without a showing that he has had experience with gun-shot wounds, may not be qualified to testify as to the direction of a bullet, and its deflection by bones or other obstructions,⁷ or as to the distance at which the firing of a pistol will cause powder marks.⁸

§ 241. Bases of Opinions.—The opinion of a medical expert may be based upon personal knowledge or observation,⁹ or upon a hypothetical statement of facts,¹⁰ or in some cases, perhaps, upon the testimony of other witnesses.¹¹ A medical expert may testify to his opinion as to the sanity of a defendant in response to hypothetical questions or to his opinion formed from a personal examination of the defendant without objection upon the part of the latter.¹² The fact that counsel for defendant had no notice or knowledge of such examination does not affect the admissibility of such evidence.¹³ It has been held that a physician may be sufficiently qualified as an expert on insanity, and to render an opinion thereon, where he had the defendant under observation for an hour or two.¹⁴ But in a case where he had seen the defendant only in the courtroom and had glanced at him once while going to the courtroom, it was held that this was not sufficient to qualify him to express an opinion, based solely on his external appearance, that his intellect was feebler than that of the average man.¹⁵

7. *People v. Yokum*, 118 Cal. 437, 50 Pac. 686.

8. *People v. Lemperle*, 94 Cal. 45, 29 Pac. 709.

9. See *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503, holding that an opinion as to the relative power of two different persons to observe things under certain named conditions, should not be received without proof that he examined their eyes.

10. See *infra*, § 243.

11. See *infra*, § 244.

12. *People v. Bundy*, 168 Cal. 777, 145 Pac. 537; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177.

13. *People v. Bundy*, 168 Cal. 777, 145 Pac. 537.

14. *People v. Delahantie*, 163 Cal. 461, 125 Pac. 1066.

15. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

§ 242. **Examination of Experts Generally.**—The questions propounded to a witness seeking to qualify as an expert should be intelligible and such that the answer cannot assume many different conditions.¹⁶ When questioned as to the value of property where material to the issues, it has been held that a witness cannot testify as to the opinion of an expert not a witness, or as to the report of such expert, as such evidence would be hearsay, nor can he testify as to his opinion as to value from other sources without designating the sources.¹⁷ An expert as to insanity may be asked, by reason of his knowledge of mental diseases, what particular symptoms would be indicative of certain phases of insanity, and whether symptoms manifesting the presence or absence of one phase would be present or absent in another.¹⁸ On a question as to the means used for strangulation the answer of an expert expressed as, "I think the means used were hands," has been held not objectionable where the expressed thought was clearly his judgment.¹⁹ That an expert has been employed and paid by the party calling him is a proper matter for consideration by the jury as going to his credibility.²⁰ But it is not competent to ask an expert witness upon cross-examination how much has been paid him for his services.¹

Reasons for opinion.—An expert may be allowed to testify to the reasons upon which he bases his opinion so that the jury can estimate its value.² And when the

16. *People v. Ernsting*, 14 Cal. App. 708, 112 Pac. 913.

17. *People v. Smith*, 3 Cal. App. 62, 84 Pac. 449.

18. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717, holding, therefore, that it is not error to permit an expert to give his opinion, addressed to the condition of defendant's testimony, that it was impossible to have all the symptoms recited in such evidence in the same person.

19. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

20. *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513.

1. *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513.

2. *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Bird*, 124 Cal. 32, 56 Pac. 639; *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315.

declarations and statements of a defendant constitute in part the basis upon which an opinion as to his insanity is based, they are admissible in evidence.³

§ 243. Hypothetical Questions.—Upon the examination of an expert, it is the practice to ask his opinion upon a hypothetical statement of facts.⁴ Indeed, it has been said that this is the best and least objectionable method of obtaining an opinion.⁵ A hypothetical question put to an expert must be based upon facts in evidence,⁶ and should have for its basis some probable, or at least possible, theory to be deduced from such evidence. While a hypothetical question may be based upon the hypothesis of the truth of all the evidence,⁷ it need not embrace all the facts in evidence,⁸ or even be limited to facts proved.⁹ It may be addressed to any reasonable theory which may be taken by the facts in evidence, and counsel has a right to frame the question to accord with his theory of what the material facts are as shown by the evidence, and in so doing may omit facts which, from his point of view, have no material bearing upon the subject. It is the privilege of counsel to assume, within the limits of the evidence, any state of facts which he claims it justifies, and to base the opinion of experts upon the facts thus

3. *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315.

4. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70. See *People v. Griffith*, 146 Cal. 339, 80 Pac. 68, holding a question not objectionable as invading the province of the jury. See *ABORTION*, vol. 1, p. 107.

5. *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517.

6. *People v. Denman*, 179 Cal. 497, 177 Pac. 461; *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612 (holding question unobjectionable because of the use of the expres-

sion "if there should have been" instead of "if there was" a certain amount of strychnine in the stomach of the deceased); *People v. Scalapino*, 143 Cal. 343, 76 Pac. 1098; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Graham*, 21 Cal. 261.

7. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

8. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. James*, 5 Cal. App. 427, 90 Pac. 561.

9. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

assumed. The facts are assumed for the purpose of the question and for no other purpose. If the theory upon which the question proceeds, does not accord with that of the opposite party as to the effect of the evidence, it is the privilege of the latter upon cross-examination to put to the witness questions formulated upon his theory of the case, and leave to the jury the question, which theory, if either, is warranted by the evidence.¹⁰

Upon cross-examination of an expert who has testified in answer to hypothetical questions, it is proper to ask him other hypothetical questions for the purpose of testing his competency as such.¹¹

§ 244. Where Expert Heard Testimony.—It has been said that an expert can never be safely permitted to state that he has heard or read the testimony of a witness or of witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence; that is to say, the facts upon which he bases his conclusion. This practice is declared to be objectionable for several reasons. It assumes that every fact which the witness has heard is in his mind, while some may have been forgotten. It allows the expert to assume that unstated evidence upon which he bases his opinion has been proved to his satisfaction, while, to the minds of the jurors, it may not have been proved at all. It permits the expert to base his opinion upon some undeclared fact or set of facts to which he may attach great weight, yet which, in the minds of the jurors, he may be entitled to little or no consideration whatever. Furthermore, it makes it impossible for the jury to determine upon precisely what facts the expert has based his opinion. And in this view it matters not whether the evidence in the

10. *People v. Denman*, 179 Cal. 48 Pac. 711; *People v. Sutton*, 73 497, 177 Pac. 461; *People v. Hill*, Cal. 243, 15 Pac. 86. See *supra*, 116 Cal. 562, 48 Pac. 711. this section.

11. *People v. Hill*, 116 Cal. 562,

case be actually conflicting or not.¹² Yet, the practice disapproved is not necessarily a ground for a reversal, if the facts upon which the opinion is sought are simple, salient and few.¹³

§ 245. **Use of Medical Treatises.**—Since statements in medical treatises are not only hearsay and wanting in the sanctity of an oath, but are also made by one who is not present in court and liable to cross-examination, it follows that medical treatises, whether proved to be standard works or not, are not admissible in evidence, except to discredit a witness who bases his testimony upon them.¹⁴ It is not competent to ask a medical expert to name the circumstances of similar cases he had read,¹⁵ or to read to him from medical works and ask him whether what is so read corresponds with his own judgment, when it is apparent that the sole object is to place before the jury the opinion of the author of the books referred to. But upon cross-examination, the latter course, while not commended, is not ground for reversal when the question is stated as that of counsel and the jury cannot know that it is an extract from such a book.¹⁶ So also it is not error to sustain an objection to a question asking an expert whether he knew a certain book was a standard work.¹⁷ An expert may, however, refresh his memory by reference to standard works.¹⁸

12. *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517. See *People v. Sowell*, 145 Cal. 292, 78 Pac. 717, holding that a ruling of the court that an expert may pass upon the truthfulness of the testimony in passing his opinion as to defendant's sanity is not prejudicially erroneous where his answer was not predicated upon the rule announced by the court.

13. *People v. Wilkins*, 158 Cal.

530, 111 Pac. 612; *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517.

14. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

15. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

16. *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553.

17. *People v. Sutton*, 73 Cal. 243, 15 Pac. 86.

18. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

§ 246. **Weight and Sufficiency.**—The weight and effect of an opinion of an expert is a matter for the jury.¹⁹ It cannot be said that the opinion of an expert witness is of no importance, or that a jury cannot base a finding upon the mere opinion of witnesses, however numerous or respectable.²⁰ On the other hand, the opinion of an expert witness is not conclusive upon the jury.¹ Its weight must be ascertained by the same rules ordinarily applied to the reception and consideration of all other evidence, whether it be direct or circumstantial.² For example, even though expert and opinion evidence all points towards defendant's insanity, the jurors have the right to weigh such evidence in conjunction with defendant's acts and conduct as disclosed on the trial, and determine whether or not the insanity was shown by a preponderance of evidence.³

XVII. WEIGHT AND SUFFICIENCY.

In General.

§ 247. **"Corpus Delicti" Defined.**—The term "corpus delicti" means the body of the offense.⁴ It embraces two elements: First, certain facts forming its basis; and, second, the existence of criminal agency as the cause of them.⁵ It involves the element of crime.⁶ For example,

19. *People v. Driggs*, 14 Cal. App. 507, 112 Pac. 577.

20. *People v. Buck*, 151 Cal. 667, 91 Pac. 527, distinguishing *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794.

1. *People v. Sainz*, 162 Cal. 242, 121 Pac. 922; *People v. Plyler*, 126 Cal. 379, 58 Pac. 904; *People v. Wilson*, 36 Cal. App. 539, 172 Pac. 1116.

2. *People v. Hales*, 23 Cal. App. 731, 139 Pac. 667.

3. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904.

4. *People v. De Martini*, 33 Cal. App. Dec. 583, 194 Pac. 506; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649. As to order of proof, see *supra*, § 303.

5. *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890; *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Alba*, 35 Cal. App. Dec. 160, 199 Pac. 894; *People v. Flores*, 34 Cal. App. 393, 167 Pac. 413.

6. *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People*

upon a charge of homicide the corpus delicti consists of death as the result, and the criminal agency of the defendant as the means.⁷ However, upon such a charge, proof of death is not sufficient proof of the corpus delicti unless there is some evidence, such as the appearance of the body, the nature of the wounds, evidences of a struggle, or other physical circumstances surrounding the affair, which indicate that a crime has been committed. The criminal agency must be shown to be other than the act of the person killed.⁸ So also, upon a charge of arson, mere proof that a building was destroyed by fire does not establish the corpus delicti, though suspicious circumstances may indicate the act of an incendiary and thus establish the corpus delicti.⁹ Proof of the corpus delicti does not involve proof that the crime was committed by the defendant or the person charged with committing it. Consequently, mere proof of the defendant's connection with the crime is not sufficient, on the one hand, to establish the corpus delicti,¹⁰ and, on the other, it is not necessary in order to establish the essential elements of the crime to prove the defendant's connection with it.¹¹ Yet, proof of the criminal agency frequently involves proof of the defendant's guilt.¹²

v. Grill, 3 Cal. App. 514, 86 Pac. 613.

7. People v. Frank, 2 Cal. App. 283, 83 Pac. 578.

8. People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Tugwell, 28 Cal. App. 348, 152 Pac. 740; People v. Frank, 2 Cal. App. 283, 83 Pac. 578. See HOMICIDE.

9. People v. Simonsen, 107 Cal. 345, 40 Pac. 440.

10. People v. Rowland, 12 Cal. App. 6, 106 Pac. 428.

11. People v. Ward, 134 Cal. 301, 66 Pac. 372; People v. De Martini,

33 Cal. App. Dec. 583, 194 Pac. 506; People v. Flores, 34 Cal. App. 393, 167 Pac. 413; People v. Ford, 25 Cal. App. 388, 143 Pac. 1075; People v. Rowland, 12 Cal. App. 6, 106 Pac. 428. Compare People v. Wagner, 29 Cal. App. 363, 155 Pac. 649, where the court says that "proof of the corpus delicti involves two distinct but nevertheless independent factors, viz., the commission of a criminal act and the defendant's guilty participation in the perpetration thereof."

12. See *infra*, § 303.

§ 248. Proof of Corpus Delicti.—The corpus delicti may be established by direct or circumstantial evidence.¹³ But it cannot be established by the extrajudicial admissions or confessions of the defendant, or, as the rule is frequently expressed, a conviction cannot be had on the extrajudicial admissions or confessions of the defendant unless corroborated by proof, aliunde, of the corpus delicti.¹⁴ While slight proof of the corpus delicti has in many cases been held to be a sufficient basis for the admission of confessions,¹⁵ it is nevertheless true that all the elements of the crime must be made to appear before a defendant's extrajudicial admissions or confessions are admissible for any purpose, and they cannot be used to establish any necessary element for the commission of the crime.¹⁶ Yet, it is not required that full proof of the body of the crime be made independently of the confes-

13. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612; *People v. Alviso*, 55 Cal. 230; *People v. Hamilton*, 32 Cal. App. Dec. 1059, 192 Pac. 467; *People v. Wilkinson*, 30 Cal. App. 473, 158 Pac. 1067; *People v. Hales*, 23 Cal. App. 731, 139 Pac. 667; *People v. Spencer*, 16 Cal. App. 756, 117 Pac. 1039; *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951.

14. *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890; *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Ward*, 145 Cal. 736, 79 Pac. 448; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Elliott*, 90 Cal. 586, 27 Pac. 433; *People v. Thrall*, 50 Cal. 415; *People v. Jones*, 31 Cal. 565; *People v. De Martini*, 33 Cal. App. Dec. 583, 194 Pac. 506; *People v. Wagner*, 29 Cal. App. 363, 155

Pac. 649; *People v. Saunders*, 13 Cal. App. 743, 110 Pac. 825; *Ex parte Hayden*, 12 Cal. App. 145, 106 Pac. 893; *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428; *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389; *People v. Eldridge*, 3 Cal. App. 648, 86 Pac. 832; *People v. Frank*, 2 Cal. App. 283, 83 Pac. 578; *People v. Long*, 1 Cal. Unrep. 710. See *ARSON*, vol. 3, p. 172.

15. See *infra*, § 303.

16. *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890 (whether the time of entering a building, being an essential element of burglary in the first degree, can be proved by defendant's confession alone, query); *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People v. Spencer*, 16 Cal. App. 756, 117 Pac. 1039; *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

sion, that is to say, that the evidence, other than the admissions and declarations of the defendant, establish the commission of the offense beyond a reasonable doubt. The admission or confession is admissible in support of any element of the crime to which it applies,¹⁷ otherwise it would be useless except to prove the agency of the accused.¹⁸ The presence of the defendant at the scene of the crime is not part of the corpus delicti, however, and may be proved by his admission.¹⁹ An admission made upon another trial in another case is none the less extrajudicial within the rule because made under oath.²⁰

§ 249. Intent—Identity.—Intent is a question of fact which may be proven like any other fact, by acts, conduct and circumstances connected with the crime.¹ Consequently, when the intent of the defendant is an issue in the case, it may be proved not only directly by his testimony,² but it may also be inferred from the proved exist-

17. *People v. Hatch*, 163 Cal. 368, 125 Pac. 907; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440. But see *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001, quoting from *Gray v. Commonwealth*, 101 Pa. 380, 47 Am. Rep. 733, to the effect that if the evidence of the corpus delicti satisfies the jury beyond a reasonable doubt that the crime has been committed, then they are entitled to give the confession such weight as it is entitled to. See *supra*, this section.

18. *People v. Jones*, 123 Cal. 65, 55 Pac. 698, quoting *United States v. Williams*, 1 Cliff. (U. S.) 5, Fed. Cas. No. 16,707.

19. *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

20. *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

1. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20; *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *People v. Watson*, 125 Cal. 342, 57 Pac. 1071; *People v. Landman*, 103 Cal. 577, 37 Pac. 518; *People v. Welsh*, 63 Cal. 167; *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112 (a specific intent may be judged by the facts and circumstances). See *ABORTION*, vol. 1, p. 108.

2. *Walker v. Chanslor*, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606; *People v. Farrell*, 31 Cal. 576; *People v. Pool*, 27 Cal. 572; *People v. Foren*, 25 Cal. 361; *People v. Moore*, 32 Cal. App. Dec. 614, 191 Pac. 980.

ence of other facts,³ including the admissions of the defendant,⁴ or the declarations of a co-conspirator.⁵

It is not necessary that the identification of the defendant as the criminal be made positively by any one witness. This is a matter for the jury to determine from all the circumstances in evidence on the subject.⁶ The corpus delicti being proved by independent evidence, the extrajudicial admissions⁷ or confessions⁸ of a defendant may be sufficient to prove guilt.

§ 250. Venue.—There must, of course, be sufficient proof of the venue in every criminal case.⁹ Since it is easy to prove the venue by direct evidence, it is better to introduce direct proof than to trust to presumptions or inferences.¹⁰ But it is not necessary that a witness testify in

3. *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919; *People v. Welsh*, 63 Cal. 167; *People v. Pool*, 27 Cal. 572; *People v. Foren*, 25 Cal. 361.

4. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20. See *supra*, § 188.

5. See *supra*, § 208.

6. *People v. Rolfe*, 61 Cal. 540; *People v. Franklin*, 31 Cal. App. Dec. 386, 188 Pac. 607.

7. *People v. Darr*, 3 Cal. App. 50, 84 Pac. 457.

8. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

9. *People v. McGregar*, 88 Cal. 140, 26 Pac. 97; *People v. Tarpey*, 59 Cal. 371; *People v. Bevans*, 52 Cal. 470; *People v. Roach*, 48 Cal. 382.

In the following cases it was held that the venue was sufficiently proved; *People v. Monroe*, 138 Cal. 97, 70 Pac. 1072 (prosecution for selling liquor to an Indian); *People v. Terrill*, 133 Cal. 120, 65

Pac. 303 (prosecution for passing fictitious note); *People v. Kamaunn*, 110 Cal. 609, 42 Pac. 1090 (where there was evidence that the deceased resided in the county and it was plainly implied that she resided in the house in front of which her body was found); *People v. Tipton*, 73 Cal. 405, 14 Pac. 894; *People v. Collins*, 36 Cal. App. Dec. 386, 202 Pac. 344 (prosecution for selling intoxicating liquor in no-license territory); *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51 (holding venue of homicide is sufficiently proved by evidence that the deceased's body was found in a building in the county, and that, from this the fact, the mortal wound was inflicted in the county may be inferred); *People v. Drevoir*, 42 Cal. App. 124, 183 Pac. 370 (holding the venue of an escape was sufficiently proved). See *supra*, § 134. See **INDICTMENT AND INFORMATION**, as to variance in proof.

10. *People v. Williams*, 18 Cal. 187.

so many words that the crime was committed in the county of the venue if the fact otherwise sufficiently appears.¹¹ When the court will take notice that a particular city is situated in the county of the venue, the venue is sufficiently shown if proved to be in the city.¹² So also the venue is sufficiently proved where a witness speaks of the crime as taking place on a certain street, although it is nowhere stated that the street is in the city or county in which the offense was laid in the accusation. In such case, the question is not strictly one of judicial knowledge of the location of the streets, but whether, under the circumstances appearing, there was sufficient evidence to satisfy the jury where the crime was committed.¹³ But proof that the crime was committed in or near a certain private building is insufficient,¹⁴ unless there is proof that the building is situated in the county of the venue.¹⁵ The venue may be proved by statements in depositions which, though admitted primarily for another purpose, are admitted generally.¹⁶ And, of course, one witness may describe where the crime was committed and another may testify that the place described is in the county.¹⁷

11. *People v. Smith*, 121 Cal. 855, 53 Pac. 802; *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678; *People v. Lock Wing*, 61 Cal. 380; *People v. Manning*, 48 Cal. 335; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712.

12. *People v. Faust*, 113 Cal. 172, 45 Pac. 261; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295; *People v. Williams*, 32 Cal. 280. See *supra*, §§ 139, 140.

13. *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604; *People v. McGregor*, 88 Cal. 140, 26 Pac. 97.

14. *People v. Parks*, 44 Cal. 105.

15. *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *People v. Lee*, 13 Cal. App. 48, 108 Pac. 738.

16. *People v. Smith*, 121 Cal. 355, 53 Pac. 802.

17. *People v. Allison*, 44 Cal. App. 118, 185 Pac. 992.

Number of Witnesses and Corroboration.

§ 251. **In General.**—It is provided by section 1844 of the Code of Civil Procedure that

“The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.”¹⁸

Even where time is of the essence of a crime, the facts may be established by one witness, and the date or time at which they transpired by another or by others.¹⁹ As a general rule, the law does not distinguish between witnesses. A defendant may be convicted upon the uncorroborated testimony of a Chinaman,²⁰ or of a child.¹ And it is not necessary that the prosecutrix in a rape case be corroborated.² So also, if the jury believe the defendant his evidence is sufficient to establish facts in his favor.³ There is, however, an exception to this rule in the case of accomplices testifying for the prosecution.⁴ And it is well settled that a defendant cannot be convicted upon his uncorroborated confession or admission. The corpus de-

18. *People v. De Martini*, 33 Cal. App. Dec. 583, 194 Pac. 506. See, also, **PERJURY**.

19. *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457.

20. *People v. Svendsen*, 25 Cal. App. 1, 142 Pac. 861. But see the discussion in **CIVIL RIGHTS**, vol. 5, p. 129, as to the “Civil Rights Bill” and its bearing on the right of a state to exclude Chinamen or other particular races from the right to testify in state courts. And see Code Civ. Proc., § 1880, as at present existing and which removes former race distinctions in this respect.

1. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928 (prosecution

under Pen. Code, § 288); *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907 (prosecution under section 288 of the Penal Code). But see Code Civ. Proc., § 1880, providing that children under ten years of age who appear incapable of receiving just impressions of the facts or of relating them truly cannot be witnesses. And see Pen. Code, § 1321, making the rules in civil cases applicable to criminal cases except as otherwise provided in the code. See generally, **INFANTS; WITNESSES**.

2. *People v. Slaughter*, 33 Cal. App. 365, 165 Pac. 44. See **RAPE**.

3. *People v. De Lay*, 80 Cal. 52, 22 Pac. 90.

4. See *infra*, § 252.

licti must be established by evidence aliunde the confession or admission.⁵

§ 252. Testimony of Accomplices Generally.—With respect to the testimony of an accomplice the code says:

“A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . .”⁶

Contrary to the rule of the common law,⁷ and the rule obtaining in the United States courts,⁸ it has been the rule of positive law in California since the year 1851, that a conviction may not be had upon the uncorroborated testimony of an accomplice.⁹ Although the jurors are the sole determinators of the facts proved by the evidence, yet if there is no evidence other than the testimony of an accomplice tending to connect the defendant with the offense charged, the judge may advise an acquittal. But this power must, of course, be exercised with great caution.¹⁰ So also, as the strength or credibility of corroborative evidence is for the jury, they are required to acquit the defendant if they disbelieve the corroborative evidence, even though they may believe the testimony of the accomplice standing by itself.¹¹

5. See *supra*, § 248.

6. Pen. Code, § 1111.

7. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *People v. Coffey*, 10 Cal. App. Dec. 419.

8. In the federal courts, while it is better practice to caution the jury against placing too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them, it is not reversible error to refuse such an instruction. *Diggs v. United States*, 220 Fed. 545, 136 C. C. A. 147.

9. *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901; *People v. Hoagland*, 138 Cal. 338, 71 Pac. 359; *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198; *In re Buckley*, 69 Cal. 1, 10 Pac. 69; *People v. Williams*, 18 Cal. 187. See *BRIBERY*, vol. 4, p. 510.

10. *People v. Clough*, 73 Cal. 348, 15 Pac. 5.

11. *People v. Whelan*, 117 Cal. 559, 49 Pac. 583; *People v. Barker*, 114 Cal. 617, 46 Pac. 601.

Competency of testimony of accomplice.—It is clear from a reading of section 1111 of the Penal Code that the testimony of an accomplice of a defendant upon trial is admissible in evidence on behalf of the prosecution, and will justify a conviction if properly corroborated.¹² The rule requiring corroboration goes to the effect of his testimony, not to its admissibility.¹³ It does not mean that the accomplice may not be believed.¹⁴ And as the actual commission of the offense may be established by the testimony of an accomplice,¹⁵ it is not necessary to establish the corpus delicti before his testimony can be admitted.¹⁶

§ 253. "Accomplice" Defined.—The word "accomplice" has been defined as including all persons who have been concerned in the commission of an offense.¹⁷ In other words, one is an accomplice who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime.¹⁸ In several cases, the courts derived a definition from the language of section 31 of the Penal Code, holding that accomplices are all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission.¹⁹ Reasoning

12. *People v. Howard*, 135 Cal. 266, 67 Pac. 148.

13. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766; *People v. Barnnovich*, 16 Cal. App. 427, 117 Pac. 572.

14. See *infra*, § 340.

15. See *infra*, § 256.

16. *People v. Barnnovich*, 16 Cal. App. 427, 117 Pac. 572.

17. *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54. See *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370, in which the court quotes

the following definition: an accomplice is "an associate in the commission of a crime, a participant in an offense, whether as principal or accessory."

18. *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799, quoting Wharton's *Crim. Ev.*, 440.

19. *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63. See *People v. Moran*, 144 Cal. 48, 77 Pac. 777, holding that one may be an accomplice without taking a physical part in the crime.

from these definitions some courts have held that one is an accomplice who may be prosecuted for the same crime as the defendant on trial, and that he is not an accomplice if not chargeable with the same crime. But prior to 1915, before the legislature defined the term, the courts repudiated this test and held that one is an accomplice for what he has done, not because of the form of punishment which the law may mete out for his acts.²⁰ Section 1111 of the Penal Code at present defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."¹

§ 254. Who are Accomplices.—From these definitions of the term, it is apparent that one can be an accomplice only when the crime charged involves the co-operation of two or more persons,² and when his co-operation in the commission of the crime is corrupt.³ Under this rule the

20. Under this rule, the giver of a bribe is an accomplice of the receiver, although his acts may be punishable as a distinct offense. Whether or not the giver is also punishable as a principal to the crime of receiving does not affect the definition of the term. *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901. See *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370, in which the supreme court in denying a rehearing disapproved of a contrary statement in the opinion of the district court of appeal.

1. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928.

The effect of the amendment of 1915 to Pen. Code, § 1111, upon the rule laid down in *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901, has not yet been

determined; *People v. Ah Gee*, 37 Cal. App. 1, 174 Pac. 371, decided in 1918, approves the test there laid down without referring to the amendment; *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24, is not altogether clear on this point. It merely distinguishes decisions cited as being not in point because referring to the law existing prior to the amendment, without indicating what cases were cited.

2. In the case of crimes which in nowise depend upon a plurality of agents, as asking a bribe, for example, the person approached is not an accomplice of the approacher. *People v. Powell*, 33 Cal. App. Dec. 832, 195 Pac. 456. See, also, *BRIBERY*, vol. 4, p. 511.

3. *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901; *People v. Keseling*, 35 Cal.

following are not accomplices: one who knows of the intended perpetration of a crime but who does not aid and abet or encourage its commission;⁴ one who did not know of the crime until after it was committed,⁵ or who is merely an accessory as that term is defined by the Penal Code;⁶ one who does not understand and appreciate the wrongfulness of the act and consent to its perpetration;⁷ and one who, except in the case of crimes punishable by death, commits the act under fear of immediate danger to his life if he refuses. But, to relieve of criminal liability, the fear must be of immediate and imminent danger—fear of future injury is not sufficient.⁸ So also one who feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators, is not an accomplice.⁹ But the reason of this rule does not extend to a peace officer who plans and executes a crime in company with others, though he claims he does so only to detect the criminal.¹⁰ One who receives part of stolen goods is not an accomplice to the crime of lar-

App. 501, 170 Pac. 627; *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63.

4. *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017; *People v. Northcott*, 31 Cal. App. Dec. 346, 189 Pac. 704 (in which the court is of the opinion, though it does not decide, that a physician is not an accomplice to an abortion who refused to perform the operation when requested, but who suggested the name of another physician, the defendant); *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808. See *ABORTION*, vol. 1, p. 113, as to who is an accomplice to an abortion.

5. *People v. Barrie*, 49 Cal. 342.

6. *People v. Collum*, 122 Cal. 186, 54 Pac. 589.

7. *People v. Camp*, 26 Cal. App. 385, 147 Pac. 95. See *supra*, § 35,

as to difference between consent and passive assent.

8. *People v. Martin*, 13 Cal. App. 96, 108 Pac. 1034; *S. C.*, 19 Cal. App. 295, 125 Pac. 919. See *People v. Miller*, 66 Cal. 468, 6 Pac. 99 (holding that a child of thirteen who assists in the commission of a felony under the threats and coercion of another is not an accomplice).

9. *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *People v. Farrell*, 30 Cal. 316; *People v. Keseling*, 35 Cal. App. 501, 170 Pac. 627. See *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396, for rule that a detective, pretending to be an accomplice, may prove that he was not such by showing that he disclosed what he was doing to his superior officer.

10. *People v. Scott*, 1 Cal. Unrep. 68.

ceny or burglary if he had nothing to do with the stealing itself.¹¹

In the case of seduction,¹² lascivious conduct with a child¹³ and extortion,¹⁴ and similar crimes, the co-operation of one of the parties is not denounced as corrupt. He is the victim and is not an accomplice. In such minor offenses as selling lottery tickets or harmful drugs, the law denounces only the selling and reasons that the purchaser's act is entirely innocent, so that he is not an accomplice. But where the co-operation is criminally corrupt, the relationship of accomplice is at once established, as in adultery, fornication, in dueling, in agreeing to fight a duel, in illegal rebating, in giving and receiving bribes, in conspiracy, and in all forms of criminal agreement, where the agreement itself constitutes the crime. Conspiracies are typical instances of agreements in and of themselves constituting crimes. All the conspirators are principals and of course accomplices.¹⁵

Children.—A child under the age of fourteen is presumed to be incapable of committing a crime, and clear proof that he knew the wrongfulness of the act is required before it can be said that he is an accomplice.¹⁶ He will not be held an accomplice if it appears that he was a mere

11. *People v. Evans*, 34 Cal. App. 284, 167 Pac. 190.

12. *People v. Coffey*, 161 Cal. 433, 39 L. B. A. (N. S.) 704, 119 Pac. 901 (obiter).

13. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928; *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24, where the court says the child could not be an accomplice under the code definition.

14. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152.

15. *People v. Coffey*, 161 Cal. 433, 39 L. B. A. (N. S.) 704, 119 Pac.

901 (discussing the scope of the rules).

A prosecutrix who, being of legal age of consent, consents to incestuous intercourse, is an accomplice to the incest. (*People v. Stratton*, 141 Cal. 604, 75 Pac. 166; *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057.) But she cannot be so regarded if she is the victim of force, or fraud, or undue influence, or is too young to give legal assent. *People v. Stratton*, 141 Cal. 604, 75 Pac. 166.

16. *People v. Camp*, 26 Cal. App. 385, 147 Pac. 95.

passive instrument in the hands of the defendant.¹⁷ A child over the age of fourteen who knowingly participated in a crime is an accomplice and must be corroborated,¹⁸ unless the crime be rape, it having been held that a girl below the age of consent is not an accomplice to the crime, even though she may in fact consent thereto.¹⁹

Effect of joint indictment.—The mere fact that a witness was jointly indicted with the defendant does not give rise to a conclusive presumption as against the state that he is an accomplice, although an admission to that effect made by the district attorney in open court is probably conclusive evidence of the fact.²⁰

§ 255. Sufficiency of Corroboration Generally.—The evidence to corroborate the testimony of an accomplice must of itself and without the aid of the testimony of the accomplice¹ connect or tend to connect the defendant with the commission of the offense charged.² It must do so of

17. *People v. Wyett*, 33 Cal. App. Dec. 159, 193 Pac. 153; *People v. Kanngresser*, 44 Cal. App. 345, 186 Pac. 388; *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24; *People v. Camp*, 26 Cal. App. 385, 147 Pac. 95. See *supra*, § 35, as to distinction between consent and submission.

18. *People v. Robbins*, 171 Cal. 466, 154 Pac. 317 (prosecution for the infamous crime against nature committed on a boy sixteen years of age).

19. *People v. Bernon*, 29 Cal. App. 424, 155 Pac. 1021. See RAPE.

20. *People v. Koster*, 14 Cal. App. 696, 112 Pac. 907, distinguishing *Commonwealth v. Desmond*, 5 Gray (Mass.), 80.

1. *People v. Coffey*, 161 Cal. 433, 39 L. B. A. (N. S.) 704, 119 Pac. 901; *People v. Morton*, 139 Cal. 719,

73 Pac. 609; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Melvane*, 39 Cal. 614; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Higgins*, 9 Cal. App. 267, 98 Pac. 683 (corroboration held sufficient). See BRIBERY, vol. 4, p. 510.

2. *People v. Howard*, 135 Cal. 266, 67 Pac. 148; *People v. Main*, 114 Cal. 632, 46 Pac. 612 (holding corroborative evidence in robbery case insufficient); *People v. Smith*, 98 Cal. 218, 33 Pac. 58; *People v. Larson*, 4 Cal. Unrep. 286, 34 Pac. 514 (corroborative evidence in robbery case held insufficient); *People v. Eckert*, 16 Cal. 110; *People v. Woodcock*, 35 Cal. App. Dec. 29, 199 Pac. 565; *People v. Desmond*, 24 Cal. App. 408, 141 Pac. 632 (evidence in prosecution for bringing firearms into county jail held

its own force independently of the testimony of the accomplice. This is indicated by the language of the statute which speaks of "other evidence." If, after the evidence of the accomplice is eliminated from the case, the evidence of the other witnesses has no essential connection with any crime and is as consistent with innocence as with guilt,³ or if it raises only a suspicion of guilt,⁴ the testimony of the accomplice is not corroborated within the meaning of the code. Formerly, the code expressly required that the corroborative evidence "in itself and without the aid of the testimony of the accomplice" tend to connect the defendant with the commission of the offense.⁵ The quoted phrase was omitted in 1911, but it has been held that the amendment in no way changed the meaning of the code section.⁶

§ 256. Scope, Character and Degree of Corroboration.—Evidence to corroborate an accomplice need not be sufficient to establish the guilt of the defendant,⁷ and it need

sufficient within rule); *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103; *People v. Ortega*, 7 Cal. App. 480, 94 Pac. 869 (corroboration in robbery held sufficient);

3. *People v. Robbins*, 171 Cal. 466, 154 Pac. 317; *People v. Sciaroni*, 4 Cal. App. 698, 89 Pac. 133.

4. *People v. Robbins*, 171 Cal. 466, 154 Pac. 317; *People v. Morton*, 139 Cal. 719, 73 Pac. 609; *People v. Hoagland*, 138 Cal. 338, 71 Pac. 359; *People v. Barker*, 114 Cal. 617, 46 Pac. 601; *People v. Koenig*, 99 Cal. 574, 34 Pac. 238; *People v. McLean*, 84 Cal. 480, 24 Pac. 32; *People v. Thompson*, 50 Cal. 480 (explaining *People v. Ames*, 39 Cal. 403); *People v. Woodcock*, 35 Cal. App. Dec. 29, 199 Pac. 565; *People v. Sciaroni*, 4 Cal. App. 698, 89 Pac. 133.

5. *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017; *People v. Compton*, 123 Cal. 403, 56 Pac. 44.

6. *People v. Robbins*, 171 Cal. 466, 154 Pac. 317; *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901. This provision was not in the Criminal Practice Act existing prior to the code, yet it was held under that act that the corroborative evidence must "of itself and without the aid of the testimony of the accomplice" tend to connect the defendant with the crime. *People v. Melvane*, 39 Cal. 614; *People v. Ames*, 39 Cal. 403.

7. *People v. Ames*, 39 Cal. 403; *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874; *People v. Blunkall*, 31 Cal. App. 778, 161 Pac. 997; *People v. Thompson*, 16 Cal. App.

not establish the actual commission of the offense.⁸ Nor need it extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense,⁹ or prove that the accomplice has told the truth.¹⁰ However, the corroborative evidence must tend in some slight degree, at least, to implicate the defendant.¹¹ While it need not be strong,¹² more is required by way of corroboration than to raise a mere suspicion.¹³ It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight.¹⁴

It is not necessary to corroborate the testimony of an accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborative evidence in the case, it is sufficient.¹⁵

748, 117 Pac. 1033; *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103.

8. *People v. Hovis*, 30 Cal. App. 703, 159 Pac. 222; *People v. Thompson*, 16 Cal. App. 748, 117 Pac. 1033; *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572; *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103; *People v. Robbins*, 171 Cal. 466, 154 Pac. 817 (the opinion of Lawlor, J., dissenting, is to the same effect).

9. *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Barker*, 114 Cal. 617, 46 Pac. 601; *People v. Kunz*, 73 Cal. 313, 14 Pac. 836; *People v. Cloonan*, 50 Cal. 449; *People v. Martin*, 19 Cal. App. 295, 125 Pac. 919; *People v. Thompson*, 16 Cal. App. 748, 117 Pac. 1033; *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113.

10. *People v. Clough*, 73 Cal. 348, 15 Pac. 5.

11. *People v. Ames*, 39 Cal. 403.

12. *People v. Coffey*, 161 Cal. 433, 39 L. B. A. (N. S.) 704, 119

Pac. 901; *People v. Clough*, 73 Cal. 348, 15 Pac. 5; *People v. Melvane*, 39 Cal. 614; *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874; *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766; *People v. Martin*, 19 Cal. App. 295, 125 Pac. 919; *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113; *People v. Sciaroni*, 4 Cal. App. 698, 89 Pac. 133.

13. See *supra*, § 255.

14. *People v. Barker*, 114 Cal. 617, 46 Pac. 601; *People v. McLeon*, 84 Cal. 480, 24 Pac. 32; *People v. Blunkall*, 31 Cal. App. 778, 161 Pac. 997; *People v. Watson*, 21 Cal. App. 692, 132 Pac. 836; *People v. Thompson*, 16 Cal. App. 748, 117 Pac. 1033; *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. See *People v. Shepardson*, 49 Cal. 629, where corroboration was held sufficient.

15. *People v. Robbins*, 171 Cal. 466, 154 Pac. 317 (per Lawlor, J., dissenting); *People v. Blunkall*, 31 Cal. App. 778, 161 Pac. 997.

While the testimony of one accomplice cannot be corroborated by that of another accomplice in the crime charged,¹⁶ the necessary corroboration may be furnished by the defendant's own testimony,¹⁷ or by admissions or confessions made by him.¹⁸ But under the express provision of the code mere evidence of the corpus delicti is not sufficient corroboration.¹⁹

§ 257. Corroborative Circumstances. — Circumstances which are consistent with an innocent purpose cannot be said to have a tendency to connect and implicate the defendant with the commission of the offense charged. The mere fact that he had an opportunity to commit the offense is of no particular significance as far as corroboration is concerned.²⁰ However, the proof may, in the judgment of the jury, tend to connect the defendant with the crime, unless satisfactorily explained.¹ So also when

16. *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082; *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198 (holding, however, that persons who are accomplices in similar crimes but not in the particular crime for which the defendant is under trial may corroborate the testimony of an accomplice); *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370.

17. *People v. Sullivan*, 144 Cal. 471, 77 Pac. 1000; *People v. Watson*, 21 Cal. App. 692, 132 Pac. 836; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370.

18. *People v. Richardson*, 161 Cal. 552, 120 Pac. 20; *People v. Davis*, 135 Cal. 162, 67 Pac. 59; *People v. Zimmerman*, 65 Cal. 307, 4 Pac. 20; *People v. Cleveland*, 49 Cal. 577; *People v. Josselyn*, 39 Cal. 393; *People v. Tobin*, 39 Cal. App. 76, 179 Pac. 443; *People v. Henson*, 32 Cal. App. 600, 163 Pac. 685; *People v. Metzler*, 21

Cal. App. 80, 130 Pac. 1192; *People v. Spadoni*, 11 Cal. App. 216, 104 Pac. 588; *People v. Melandrez*, 4 Cal. App. 396, 88 Pac. 372.

19. *People v. Clough*, 73 Cal. 348, 15 Pac. 5. See *supra*, § 248 et seq., as to proof of corpus delicti.

20. *People v. Robbins*, 171 Cal. 466, 154 Pac. 317; *People v. Morton*, 139 Cal. 719, 73 Pac. 609; *People v. Koenig*, 99 Cal. 574, 34 Pac. 238; *People v. Sciaroni*, 4 Cal. App. 698, 89 Pac. 133.

1. *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *People v. Cleveland*, 49 Cal. 577; *People v. Melvane*, 39 Cal. 614; *People v. Solomon*, 6 Cal. Unrep. 305, 58 Pac. 55 (where the defendant stored the goods in the rear of a saloon). See BURGLARY, vol. 4, p. 744; LARCENY; RECEIVING STOLEN GOODS.

testified to by some witness other than the accomplice,² the circumstances may tend to connect the defendant with the commission of the crime; as, for instance, suspicious conduct on his part after the commission of the crime, in giving an assumed name;³ efforts upon his part to suppress evidence against him;⁴ and flight from the scene of the crime.⁵ That the defendant's shoes fitted perfectly in the footprints found near the scene of the crime, has been held to be sufficient corroboration.⁶ And in a prosecution for forgery, the identity of the work done by a typewriter used by the defendant with that on the forged instruments was regarded as a sufficiently corroborative circumstance.⁷ But the mere fact that one of the parties charged with the crime was addressed by his accomplices by his Christian name does not of itself necessarily tend to connect him with the crime.⁸

Degree of Proof.

§ 258. **In General.**—It is a well-established rule in criminal prosecution that a mere preponderance of evidence is insufficient to warrant a verdict of conviction. However, it is not necessary that the guilt of a defendant be established by evidence which amounts to a mathematical certainty, that is to say, by evidence which excludes all possible doubt.⁹ The general rule, except in cases where

2. See *People v. Hong Tong*, 85 Cal. 171, 24 Pac. 726, holding that when no other witness testifies to a corroborative circumstance, the evidence of the witness testifying is not corroborated by his testifying that after the commission of the crime the defendant fled.

3. *People v. Cleveland*, 49 Cal. 577.

4. *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198.

5. *People v. Armstrong*, 114 Cal.

570, 46 Pac. 611; *People v. Ardell*, 6 Cal. Unrep. 827, 66 Pac. 970 (where the defendant fled after a failure to have a prosecution against his accomplice dismissed).

6. *People v. Barnnovich*, 16 Cal. App. 427, 117 Pac. 572.

7. *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766.

8. *People v. Ames* 39 Cal. 403.

9. *People v. Ah Sun*, 160 Cal. 788, 118 Pac. 240 ("moral certainty" does not exclude every

insanity is interposed as a defense¹⁰ is that to justify a conviction the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense and to identify the defendant as the perpetrator.¹¹ This rule is expressly stated in section 2061 of the Code of Civil Procedure,¹² and also in section 1096 of the Penal Code.¹³ The doctrine of reasonable doubt goes not only to the whole evidence, but equally to every material issue. And if after a review of all the evidence including that of the defendant, if any, the jury entertain a reasonable doubt upon any one material issue, it is their duty to give the defendant the benefit of that doubt and acquit him.¹⁴ For example, where a specific intent is

speculative and fanciful possibility); *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *People v. Ferry*, 84 Cal. 31, 24 Pac. 33; *People v. Beck*, 58 Cal. 212; *People v. Brotherton*, 47 Cal. 388; *People v. Padillia*, 42 Cal. 535; *People v. Barrios*, 35 Cal. App. Dec. 111, 199 Pac. 58; *People v. Gibson*, 39 Cal. App. 202, 178 Pac. 338 (an instruction that the evidence must entirely convince the jury of defendant's guilt is erroneous).

10. See *infra*, § 263.

11. *People v. Miller*, 171 Cal. 649, 154 Pac. 468; *People v. Harris*, 169 Cal. 53, 145 Pac. 520 (per Henshaw, J., specially concurring); *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Cheong Foon Ark*, 61 Cal. 527; *People v. Core*, 59 Cal. 390; *People v.*

Brannon, 47 Cal. 96; *People v. Woody*, 45 Cal. 289; *People v. Padillia*, 42 Cal. 535; *People v. Alba*, 35 Cal. App. Dec. 160, 199 Pac. 894; *People v. De Martini*, 33 Cal. App. Dec. 583, 194 Pac. 506; *People v. Byler*, 35 Cal. App. 208, 169 Pac. 431. See ABDUCTION, vol. 1, p. 96; and ABORTION, vol. 1, p. 107.

The mere difficulty of proof does not justify a conviction upon less proof; *People v. De Martini*, 33 Cal. App. Dec. 583, 194 Pac. 506.

12. In criminal cases guilt must be established beyond a reasonable doubt. Code Civ. Proc., § 2061.

13. "In case of a reasonable doubt whether his [the defendant's] guilt is satisfactorily shown, he is entitled to an acquittal." Pen. Code, § 1096.

14. *People v. Harris*, 169 Cal. 53, 145 Pac. 520 (per Henshaw, J., specially concurring); *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Morino*, 53 Cal. 67; *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843.

requisite, the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to criminal intent. If the acts are equivocal, or equally consistent with the absence of the felonious intent charged in the indictment or information, they are insufficient to warrant a verdict of guilty.¹⁵

Doubt as to degree.—It is provided by the Penal Code that

“When it appears that the defendant has committed a public offense, and there is a reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.”¹⁶

§ 259. “Reasonable Doubt”—Generally Accepted Definition.—The definition of “reasonable doubt” given by Chief Justice Lemuel Shaw in an early Massachusetts case has been adopted by the courts of California, as it has by practically all other states, as the best definition of the term. It is as follows: “It [a reasonable doubt] is not a mere possible doubt; because everything relating to human affairs, or depending on moral evidence, is open to some possible or imaginable doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. . . . The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it.”¹⁷ It has been contended this defi-

15. *People v. Fleming*, 94 Cal. 308, 29 Pac. 647 (holding that the evidence failed to show an intent to commit rape by force).

16. Pen. Code, § 1097; *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405 (discussing sufficiency of in-

struction embodying rule); *People v. Milgate*, 5 Cal. 127.

17. *People v. Miller*, 171 Cal. 649, 154 Pac. 468 (quoting from *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711); *People v. Lewandowski*, 143 Cal.

nition is erroneous because it declares that a reasonable doubt is a state of the case rather than a condition of the mind, but without success.¹⁸

§ 260. Other Definitions.—The trial courts have, at times, attempted to give other definitions of the phrase “reasonable doubt.” In most instances these have been disapproved as erroneous or at least less perspicuous than the definition of Chief Justice Shaw.¹⁹ The following definition has been approved, however: The term “reasonable doubt” means an actual and substantial doubt arising from the unsatisfactory nature of the evidence of the case. It does not mean a doubt which may arise from some mere whim or vagary or from any groundless surmise or guess.²⁰ It is not error for a court giving Justice Shaw’s definition to add thereto the words, “A reasonable doubt is not a mere guess or surmise,”¹ or to state that it is not a mere conjectural or capricious doubt,² but “an actual and substantial doubt.”³ While the instruction defining “reasonable doubt” as “a fair doubt growing out of the evidence or want of evidence, based upon reason and common sense” has been held not to import error,⁴ it has

574, 77 Pac. 467; *People v. Wreden*, 59 Cal. 392; *People v. Beck*, 53 Cal. 212; *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 190 Pac. 656.

18. *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467; *People v. Muhly*, 15 Cal. App. 416, 114 Pac. 1017; *People v. Verduceo*, 13 Cal. App. 789, 110 Pac. 970.

19. *People v. De Los Angeles*, 61 Cal. 188 (holding instruction given to be meaningless). See *People v. Garibaldi*, 1 Lab. 234, where the following definition was given: By reasonable doubt is not meant a mere suspicion that the defendant may be innocent or guilty or that any theory of the defense or prosecution may be correct, but a rea-

sonable doubt of the defendant’s guilt, after considering the whole testimony.

20. *People v. T. Wah Hing*, 32 Cal. App. Dec. 108, 190 Pac. 662.

1. *People v. Ah Lee*, 164 Cal. 350, 128 Pac. 1035.

2. *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861; *People v. Yun Kee*, 8 Cal. App. 82, 96 Pac. 95.

3. *People v. Del Cerro*, 9 Cal. App. 764, 100 Pac. 887.

4. *People v. White*, 116 Cal. 17, 47 Pac. 771; *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 190 Pac. 656 (per opinion of supreme court denying hearing).

nevertheless been condemned, for, to say that a reasonable doubt is a "fair doubt" is to give an explanation that does not explain.⁵ And the phrase "common sense" lacks precision.⁶ An instruction that if the jury are morally convinced of the defendant's guilt and fully satisfied of the truth of the criminal charge, they are convinced beyond a reasonable doubt is not sound and should not be given.⁷ And an instruction which states that a reasonable doubt is such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself, is erroneous, as it requires nothing more than a preponderance of evidence to work a conviction.⁸ And it tends to confusion to tell a jury that the defendant is entitled to be acquitted if there remains a reasonable doubt of his guilt, and then, in the next breath, to tell them that "mere possible doubt, however reasonable, which besets some minds on all occasions" should not prevent a verdict of guilty.⁹

5. *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329.

6. *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734.

7. *People v. Smith*, 164 Cal. 451, 129 Pac. 785; *People v. Schoedde*, 126 Cal. 373, 58 Pac. 859.

8. *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266; *People v. Ah Sing*, 51 Cal. 372 (holding an instruction erroneous which states that there cannot remain a reasonable doubt when the evidence is such "that a man of prudence would act upon it in his own affairs of greatest importance"); *People v. Brannon*, 47 Cal. 96 (an instruction is erroneous which directs a con-

viction if the jury be satisfied of defendant's guilt "to such a moral certainty as would influence the minds of the jury in important affairs of life"). See *People v. Ashe*, 44 Cal. 288, holding this is "not perhaps the best definition."

An instruction embodying the negative proposition that the evidence is insufficient to convict if it would influence men in the important affairs of life, lacks precision and may be refused. *People v. Lenon*, 79 Cal. 625, 21 Pac. 967.

9. *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021 (holding, however, the error not prejudicial); *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310; *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566.

§ 261. "Moral Certainty"—Satisfactory Evidence.—It is provided by the Code of Civil Procedure that

"The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."¹⁰

It seems that this code section deals exclusively with evidence in criminal cases and purports to do no more than to declare what character of evidence will support a verdict. Therefore, to prove a fact to a moral certainty is not to prove it by a mere preponderance of evidence but to establish it beyond a reasonable doubt.¹¹ Indeed, the Massachusetts court used the words "moral certainty" in its famous definition of "reasonable doubt."¹² A definition of "moral certainty" as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it, lacks precision and should not be given a jury.¹³ But such definition is not prejudicial, as the word "impression" does not vary essentially from "conviction" and does not render the instruction objectionable as allowing the jury to be governed by their "impressions."¹⁴

Satisfactory evidence.—The code provides as follows:

"That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."¹⁵

10. Code Civ. Proc., § 1826.

11. *People v. Miller*, 171 Cal. 649, 154 Pac. 468. *Contra: Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266. See *People v. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416, distinguishing the *Treadwell* case.

12. See *supra*, § 259.

13. *People v. Huntington*, 138

Cal. 261, 70 Pac. 284; *People v. McDonnell*, 32 Cal. App. 694, 163 Pac. 1046 (holding a refusal of the instruction was proper).

14. *People v. Lew Fook*, 141 Cal. 548, 75 Pac. 188; *People v. Burns*, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087.

15. Code Civ. Proc., § 1835.

While this code provision has been criticised as being in conflict with other provisions of the law,¹⁶ it has been suggested that, like section 1826 just referred to, it deals exclusively with the sufficiency of evidence in criminal cases, and that any difficulty in applying it is entirely removed if to the sentence, "Such evidence alone will justify a verdict," there be added the words "of conviction."¹⁷

§ 262. Defenses.—There is a marked difference in the degree of proof required to establish any fact against the defendant, and that sufficient to establish any fact in his favor. Since the prosecution is required to prove the guilt of a defendant beyond a reasonable doubt, it follows that any fact necessary to the defense confined to the original transaction on which the charge is founded only needs to be established sufficiently to create a reasonable doubt of the defendant's guilt when taken into consideration with all the evidence in the case.¹⁸ To require a defendant to establish his defense by a preponderance of evidence would manifestly shift the burden of proof and deprive him of the benefit of the doctrine of reasonable doubt.¹⁹ Since an alibi is not a defense in the strict sense of the term,²⁰ a defendant who relies upon it is not bound

16. *People v. Miller*, 171 Cal. 649, 154 Pac. 468 (per Angellotti, C. J.).

17. *People v. Miller*, 171 Cal. 649, 154 Pac. 468 (per Henshaw, J., specially concurring).

18. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082; *People v. Ah Gee Yung*, 86 Cal. 144, 24 Pac. 860; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549 (overruling *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Raten*, 63 Cal. 421); *People v. Cheong Foon Ark*, 61 Cal. 527; *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52; *People v.*

Marshall, 59 Cal. 386. See *People v. Milgate*, 5 Cal. 127; *People v. Pitisci*, 29 Cal. App. 727, 157 Pac. 502, holding that the facts in favor of a defendant need be proved only by a preponderance of evidence.

See note, 10 A. L. R. 8, as to propriety of instructions as to significance of evidence concerning defendant's good character as element bearing upon question of reasonable doubt.

19. *People v. Cheong Foon Ark*, 61 Cal. 527, quoting *People v. Marshall*, 8 Pac. C. L. J. 841.

20. See *supra*, § 34.

or required to prove it beyond a reasonable doubt or even by a preponderance of evidence. He is entitled to an acquittal if a reasonable doubt is raised in the minds of the jury from the evidence as to his presence at the scene of the crime.¹ A defendant need not establish an alibi at all unless the prosecution has established *prima facie* the facts of time and place.² There is a single instance in the criminal law of California where a defendant is called upon to establish a fact by a preponderance of evidence, and that is when he relies upon insanity as a defense.³

§ 263. **Insanity.**—There are in this country several lines of authorities upon the proposition as to the amount of proof of insanity which must be introduced by a defendant to authorize an acquittal. In California the rule is well established that while, on the one hand, an accused is not required to establish his insanity beyond a reasonable doubt,⁴ on the other hand, it is not sufficient for the defendant merely to raise a reasonable doubt as to his sanity.⁵ The burden rests upon him to establish his in-

1. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514; *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951; *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463. Compare *People v. Ye Foo*, 4 Cal. App. 730, 89 Pac. 450, where it is said that "The defense of an alibi is an affirmative one, and, if established, a complete defense, and the burden is upon the defendant to prove it."

2. *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463.

3. See *infra*, § 263.

4. *People v. Miller*, 171 Cal. 649, 154 Pac. 468 (holding an instruction that "preponderance of evi-

dence" was that degree of evidence proving a fact to a moral certainty or producing conviction in an unprejudiced mind, is equivalent to proof beyond a reasonable doubt, and therefore is erroneous); *People v. Methever*, 132 Cal. 326, 64 Pac. 481 (holding it proper to modify an instruction by striking out the words "beyond a reasonable doubt"); *People v. Messersmith*, 57 Cal. 575 (Lord Mansfield's opinion that insanity must be proved "beyond all doubt" is not the rule in California); *People v. Wilson*, 49 Cal. 13; *People v. Coffman*, 24 Cal. 230.

5. *People v. Loomis*, 170 Cal. 347, 149 Pac. 581; *People v. Harris*, 169 Cal. 53, 145 Pac. 520; *People*

sanity by a preponderance of evidence,⁶ that is to say, by the same amount of evidence by which insanity may be proved in a civil action.⁷ While for practical purposes there cannot be any great difference between the character of the proof which is sufficient to establish insanity by a preponderance of evidence, and that which is sufficient to displace the presumption of sanity and raise a reasonable doubt of its existence, as the burden rests upon a defendant to prove his insanity, it cannot be said that he has proved it by raising a doubt as to whether or not it exists.⁸

In sustaining this burden the defendant is not bound to rely solely upon evidence introduced by himself. The defendant is entitled to the benefit of all evidence in his favor, whether produced upon the people's case or upon his defense.⁹

v. Oppenheimer, 156 Cal. 733, 106 Pac. 74; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; People v. Ward, 105 Cal. 335, 38 Pac. 945; People v. Bawden, 90 Cal. 195, 27 Pac. 204; People v. Travers, 88 Cal. 233, 26 Pac. 88 (this rule is not disturbed by People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549, and subsequent cases); People v. Pico, 62 Cal. 50; People v. McDonell, 47 Cal. 134.

6. People v. Morisawa, 180 Cal. 148, 179 Pac. 888; People v. Harris, 169 Cal. 53, 145 Pac. 520; People v. Willard, 150 Cal. 543, 89 Pac. 124; People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Allender, 117 Cal. 81, 48 Pac. 1014; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Messersmith, 57 Cal. 575; People v. Ferris, 55 Cal. 588 (insanity "must be satisfactorily established by a preponderance of evidence"); Peo-

ple v. Bell, 49 Cal. 485; People v. Wilson, 49 Cal. 13; People v. McDonell, 47 Cal. 134; People v. Coffman, 24 Cal. 230; People v. Myers, 20 Cal. 518; People v. Zari, 36 Cal. App. Dec. 56, 201 Pac. 345; People v. Zentgraf, 33 Cal. App. Dec. 190, 193 Pac. 274 (holding an instruction embodying the rule to be correct); People v. Preciado, 31 Cal. App. 519, 160 Pac. 1090; People v. Ashland, 20 Cal. App. 168, 128 Pac. 798.

This is not the rule in the United States supreme court. People v. Allender, 117 Cal. 81, 48 Pac. 1014, citing Davis v. United States, 160 U. S. 469, 40 L. Ed. 499, 16 Sup. Ct. Rep. 353, see, also, Rose's U. S. Notes.

7. People v. Wilson, 49 Cal. 13. See INSANITY.

8. People v. Myers, 20 Cal. 518.

9. People v. Carantan, 11 Cal. App. 561, 105 Pac. 768.

§ 264. “**Preponderance of Evidence**” Defined. — The term “preponderance of evidence,” as used in connection with the defense of insanity in criminal cases, means such evidence on one side as outweighs, preponderates over, or is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.¹⁰ It is such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests. The party upon whom rests the burden of proof having produced sufficient evidence to support a conclusion in his favor, a question of preponderance arises where opposing evidence has also been introduced, and when in view of the opposing evidence the jury is in doubt, and not at all satisfied or convinced, the decision must be based on the preponderance rule. If the evidence preponderates in favor of the people or is equally balanced, the decision must be for the people, but if it preponderates ever so slightly for the defendant, he is entitled to a verdict, even though the jury may not be satisfied of the truth of the fact to a moral certainty.¹¹

Circumstantial Evidence.

§ 265. **In General.**—In view of the secrecy in which crimes are frequently committed, the necessity of resorting to circumstantial evidence, that is to say, evidence of circumstances from which the existence of the fact in dispute may be inferred,¹² is obvious and absolute.¹³ Circumstantial evidence is admissible to prove any fact in

10. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Miller*, 171 Cal. 649, 154 Pac. 468.

11. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Miller*, 171 Cal. 649, 154 Pac. 468 (per Angellotti, C. J., in bank).

12. *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477.

13. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Morrow*, 60 Cal. 142.

issue,¹⁴ including the corpus delicti,¹⁵ the intent with which the crime was committed,¹⁶ and the identity of the defendant as the criminal.¹⁷

§ 266. Degree of Proof.—The law declares nothing as to the relative probative force of direct and circumstantial evidence.¹⁸ It does not belittle the value of circumstantial evidence by making relative distinction between it and direct evidence¹⁹ or by requiring any stronger degree of proof, where, for a conviction, sole reliance is placed upon circumstantial evidence. Whether the evidence is direct or circumstantial, the final test of the sufficiency of the evidence is the same, to wit, does the whole evidence together satisfy the minds of the jurors beyond a reasonable doubt of the truth of the charge.²⁰ In other words, facts should be proved which are not only consistent with the guilt of the defendant but inconsistent with any reasonable hypothesis of innocence.¹ And

14. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691 (the consummation of an act of rape may be shown by circumstances); *People v. Wymer*, 35 Cal. App. Dec. 420, 199 Pac. 815; *People v. Sartori*, 43 Cal. App. 304, 184 Pac. 879 (holding that the existence of a conspiracy may be inferred from facts proved, although there is direct evidence of its nonexistence); *People v. Danford*, 14 Cal. App. 442, 112 Pac. 474 (holding that the fact that the defendant intercepted a telegraph message could be proved by circumstantial evidence); *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471, 107 Pac. 712 (holding that a conspiracy may be established by circumstantial evidence); *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466 (natural objects may be traced

to the possession of the defendant by circumstantial evidence).

15. See *supra*, § 248.

16. See *supra*, § 249.

17. See *supra*, § 153.

18. *People v. Howland*, 13 Cal. App. 363, 109 Pac. 894.

19. *People v. Hales*, 23 Cal. App. 731, 139 Pac. 667.

20. *People v. Bellamy*, 109 Cal. 610, 42 Pac. 236; *People v. Murray*, 41 Cal. 66; *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372; *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477. See note 15 A. L. R. 634, as to conviction of perjury on circumstantial evidence.

1. *People v. Staples*, 149 Cal. 405, 86 Pac. 886; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Eagan*, 116 Cal. 287, 48 Pac. 120; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *People v. Lachanais*, 32 Cal. 433; *People*

every single fact from which the deduction of guilt is to be drawn, must be proved by evidence to a moral certainty and beyond a reasonable doubt.² It is for the jury to decide whether any special piece of evidence or circumstance is a necessary link in the chain of circumstantial evidence. If they decide in the affirmative as to any fact or circumstance, then it must be proved beyond a reasonable doubt.³ The proof must establish, not merely tend to establish guilt,⁴ and it is insufficient merely to prove an opportunity to commit the crime charged.⁵

Q. TRIAL.

I. INTRODUCTORY.

§ 267. "Trial" Defined.—The word "trial" is defined by Webster to mean "the formal examination of a matter in issue in a case before a competent tribunal."⁶ It has been defined by the district court of appeal as the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue.⁷ Except where there is a trial de novo after appeal, as in certain appeals from justices' courts, the word "trial," as com-

v. Dick, 32 Cal. 213; People v. Strong, 30 Cal. 151; People v. Schuler, 28 Cal. 490; People v. Silva, 32 Cal. App. Dec. 984, 192 Pac. 330; People v. Lejkojes, 32 Cal. App. Dec. 928, 192 Pac. 160.

2. People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; People v. Smith, 106 Cal. 73, 39 Pac. 40 (modification of instruction embodying the rule held proper); People v. Ah Chung, 54 Cal. 398; People v. Phipps, 39 Cal. 326; People v. Olsen, 1 Cal. App. 17, 81 Pac. 676 (instruction held to be correct).

3. People v. Wilt, 173 Cal. 477, 160 Pac. 561; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595.

4. People v. Paulsell, 115 Cal. 6, 46 Pac. 734.

5. People v. Tarbox, 115 Cal. 57, 46 Pac. 896; People v. Silva, 32 Cal. App. Dec. 984, 192 Pac. 330.

6. In re Begerow, 133 Cal. 349, 357, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828 (quoted by Garoutte, J., dissenting). See TRIAL.

7. People v. Stokes, 5 Cal. App. 205, 89 Pac. 997.

monly understood in California practice, includes nothing beyond proceedings in the court in which the case originated.⁸ A trial commences when the case is called for trial unless the trial be then postponed,⁹ and ends with the announcement of the verdict.¹⁰ And it includes every step taken, after issue of fact joined, for the purpose of a determination of that issue, in the court where the cause is pending, up to and including the verdict upon such issue.¹¹ It includes the impaneling of the jury,¹² and the reading of evidence at the request of the jury after they have retired,¹³ but not the pronouncing of the judgment, which is the formal declaration of sentence,¹⁴ or an appeal.¹⁵

§ 268. Separate Trials and Consolidation of Charges.—The Penal Code provides that if two or more indictments or informations are filed in cases where the charges may be charged in separate counts in one indictment or information, the court may order them to be consolidated.¹⁶ Under this provision it has been held that a charge of rape and of the infamous crimes against nature committed upon the same person may be consolidated.¹⁷

Joint and separate trials.—The Penal Code, as amended in 1921, provides as follows:

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|---|---|
| 8. <i>People v. McKamy</i> , 168 Cal. 531, 535, 143 Pac. 752. | 146 Cal. 379, 385, 80 Pac. 234); <i>People v. White</i> , 5 Cal. App. 329, 340, 90 Pac. 471. |
| 9. <i>People v. Stewart</i> , 64 Cal. 60, 28 Pac. 112. | 12. <i>People v. Hawkins</i> , 127 Cal. 372, 59 Pac. 697. |
| 10. <i>People v. Stokes</i> , 5 Cal. App. 205, 89 Pac. 997. See <i>People v. Stewart</i> , 64 Cal. 60, 28 Pac. 112, where the court says "that everything that transpires in the case after that (the commencement), and before judgment is a part of the trial." | 13. <i>People v. Kohler</i> , 5 Cal. 72. |
| 11. <i>People v. Turner</i> , 39 Cal. 370 (cited in <i>Green v. Duvergey</i> , | 14. <i>People v. Stokes</i> , 5 Cal. App. 205, 214, 89 Pac. 997. See <i>infra</i> , §§ 468-504. |
| | 15. <i>People v. McKamy</i> , 168 Cal. 531, 536, 143 Pac. 752. |
| | 16. Pen. Code, § 954. |
| | 17. <i>People v. MacDonald</i> , 35 Cal. App. Dec. 626, 200 Pac. 491. |

“When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. . . . ”¹⁸

The trial court has discretion to direct which one of several codefendants who have pleaded separately shall be first tried.¹⁹

§ 269. Furnishing Defendant With Copy of Evidence—Bill of Particulars.—Section 870 of the Penal Code provides that, upon demand, a transcript of the depositions taken on the information or on the preliminary examination shall be immediately furnished the defendant or his attorney after commitment of the defendant;²⁰ and section 925 of the Penal Code provides in part, that

“If an indictment has been found against a defendant, a copy of the testimony given in his case before the grand jury, shall be served upon him within five days after the discharge of the grand jury, or if the grand jury has not been discharged, at least five days before the cause is set for trial.”

Of course the latter section does not apply to a case in which no demand is made for a reporter and the testimony is not taken down by a reporter.¹

18. Pen. Code, § 1098, in part. See the remaining portion of the code section as to the challenges allowed to each defendant and the manner of exercising them. See *People v. Alviso*, 55 Cal. 230 (holding, under the former practice, that a demand for a separate trial, after a waiver thereof, is addressed to the discretion of the trial court); *People v. McCalla*, 8 Cal. 301 (decided under the Criminal

Practice Act); and *People v. Ho Kim You*, 24 Cal. App. 451, 141 Pac. 950, as to waiver of demand for separate trial under this section before the amendment of 1921.

19. *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

20. See *supra*, § 118, where this section is quoted.

1. *People v. Ung Sing*, 171 Cal. 83, 151 Pac. 1145.

Bill of particulars.—While a defendant is not entitled to a bill of particulars of evidence relied upon to sustain an indictment or information,² a trial court may direct the district attorney to furnish such a bill and, in furtherance of justice, dismiss the prosecution if he fails to do so.³

§ 270. Separate Trial of Issue of Insanity.—In reference to the issue of insanity the code contains the following provisions:

“A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane.”⁴

“If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity.”⁵

The doubt referred to in the latter section is a doubt arising in the mind of the court having the defendant in charge.⁶ If such a doubt exists, it is the duty of the trial court to suspend the trial pending the settlement of the question of defendant's present insanity,⁷ otherwise not.⁸ Ordinarily, the matter is one calling for the exer-

2. *People v. Alviso*, 55 Cal. 230.

3. *People v. Superior Court*, 35 Cal. App. Dec. 399, 199 Pac. 840.

4. Pen. Code, § 1367; *People v. Farrell*, 31 Cal. 576.

5. Pen. Code, § 1368.

6. *People v. Fountain*, 170 Cal. 460, 467, 150 Pac. 341; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Kirby*, 15 Cal. App. 265, 114 Pac. 794.

7. *People v. Ah Ying*, 42 Cal. 18.

8. *People v. Miller*, 177 Cal. 404, 410, 170 Pac. 817; *People v. Fountain*, 170 Cal. 460, 467, 150 Pac. 341; *People v. Loomis*, 170 Cal. 347, 149 Pac. 581 (holding the showing made did not compel a doubt); *People v. Geiger*, 116 Cal. 440, 48 Pac. 389 (holding a refusal to order an inquisition was not error, where it was proved that the defendant had been committed to an insane asylum, but had escaped therefrom, after the res-

cise of the discretion of the trial court,⁹ but the circumstances may be such that it should be held as a matter of law that a doubt was or should have been created.¹⁰ While ordinarily a doubt should be raised when statements under oath are made by a credible person that the defendant is insane,¹¹ a court is not constrained to entertain this doubt simply because counsel entertained such a belief proceeding from some conversations with the defendant,¹² or because a witness testifies that he believes the defendant to be insane.¹³ On the contrary, a trial court has ample opportunity to and should, as its duty, observe and note the defendant's mental condition from time to time, and in particular on the day when his present insanity is suggested. The knowledge so gained may contribute largely toward rebutting any possible inference of present legal insanity deducible from the facts stated in an affidavit of counsel, or by a witness.¹⁴ The mere fact that evidence as to the present insanity of a defendant is admitted in evidence does not show that the court entertains a doubt as to his present sanity,¹⁵ as

ident physician decided he had been restored to reason but before his discharge); *People v. Lee Fook*, 85 Cal. 300, 24 Pac. 654; *People v. Stock*, 19 Cal. App. 748, 127 Pac. 798; *People v. Kirby*, 15 Cal. App. 265, 114 Pac. 794.

9. *People v. Keyes*, 178 Cal. 794, 802, 175 Pac. 6; *People v. Loomis*, 170 Cal. 347, 149 Pac. 581.

10. *People v. West*, 25 Cal. App. 369, 143 Pac. 793 (holding that where a person in an insane asylum killed a person in an attempt to escape, and where the conduct of the defendant on the trial showed him incapable of making a defense, a doubt of defendant's sanity should be created as a matter of law).

11. *People v. West*, 25 Cal. App. 369, 143 Pac. 793.

12. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341.

13. *People v. Lee Fook*, 85 Cal. 300, 303, 24 Pac. 654 (but Paterson, J., dissenting, was of the opinion that it was the duty of the court to suspend the trial when the deputy sheriff, the defendant's keeper, testified that he believed the defendant insane); *People v. Huntoon*, 41 Cal. App. 392, 182 Pac. 776 (where a medical witness testified that he believed the defendant to be insane).

14. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341; *People v. Kirby*, 15 Cal. App. 264, 269, 114 Pac. 794.

15. *People v. Lee Fook*, 85 Cal. 300, 24 Pac. 654.

such evidence is admissible to prove insanity at the time of the crime charged.¹⁶ But when in addition thereto, a court instructs the jury to acquit if they are satisfied that the defendant is then insane, a doubt on the part of the court as to the defendant's insanity is implied so that a judgment of conviction is erroneous if the trial is not suspended and the question settled.¹⁷

Procedure to create doubt.—The code provides no procedure for creating a doubt of the present insanity of a defendant, and much must be left to the discretion of the trial court.¹⁸ No plea of present sanity is required.¹⁹ The question may be brought to the attention of the court by the affidavits of credible witnesses. And it is the duty of the court to order an inquisition, upon its own motion, if at any time a doubt arise as to a defendant's present sanity.²⁰

§ 271. Degree of Insanity Authorizing Inquisition.—The provisions of the Penal Code quoted in the preceding paragraph merely put into statutory form a well-known regulation of the common law, forbidding proceedings against one who is mentally deranged to such an extent as to be incapable of appreciating his situation and making any legal defense that he may have.¹ This fact furnishes a key to the determination of the question as to what degree of insanity is requisite to authorize an inquisition into the present insanity of a defendant. The test, therefore, is not whether he is insane within the law applicable to state hospitals for insane,² nor whether he is so

16. See *supra*, § 162.

17. *People v. Ah Ying*, 42 Cal. 18.

18. *People v. Hettick*, 126 Cal. 425, 58 Pac. 918.

19. *People v. Ah Ying*, 42 Cal. 18 (quoted in *People v. Lee Fook*, 85 Cal. 300, 303, 24 Pac. 654).

20. *People v. Ah Ying*, 42 Cal. 18.

1. In *re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120 (quoting 4 Blackstone's Commentaries, 24).

2. In *re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120 (per Garoutte, J., specially concurring); *People v. Kirby*, 15 Cal. App. 265, 114 Pac. 794. See INSANITY.

insane as not to be responsible for crime,³ but whether he is mentally incompetent to make a rational defense.⁴ If a person charged with a crime is capable of understanding the nature and object of the proceedings against him, if he rightly comprehends his own conduct in reference to such proceedings and can conduct his defense in a rational manner, if he can remember events and can reason logically, he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound; otherwise not.⁵

§ 272. Nature of Proceedings—Order of Trial.—The proceedings provided by the Penal Code for the determination of the present sanity of a defendant are special proceedings of a civil nature. Because of this fact and because there is nothing in the provisions relative thereto that makes applicable the provisions of the code relative to the formation of juries for the trial of persons charged with the commission of a crime, it follows that such statutes have no application.⁶ The order of trial is prescribed in detail in section 1369 of the Penal Code.

As on trials for criminal offenses it is not ground for reversal to caution the jury against ingenious counterfeits of insanity. And it is not error to instruct the jury as to the test of sanity as a defense to crime, if they are told this is not the test for their guidance.⁷

3. *People v. West*, 25 Cal. App. 369, 143 Pac. 793.

4. *People v. Lawson*, 178 Cal. 722, 174 Pac. 885; *In re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120; *People v. West*, 25 Cal. App. 369, 143 Pac. 793. See note, 3 A. L. R. 94, as to test of present insanity which will prevent trial for crime or punishment after conviction.

5. *In re Buchanan*, 129 Cal. 330,

50 L. R. A. 378, 61 Pac. 1120, approving the test declared in *Freeman v. People*, 4 Denio (N. Y.), 9, 47 Am. Dec. 216.

6. The proceedings under section 1367 of the Penal Code under section 1221 et seq., are both special proceedings of a civil nature. *People v. Lawson*, 178 Cal. 722, 174 Pac. 885.

7. *People v. Lawson*, 178 Cal. 722, 174 Pac. 885.

§ 273. Proceedings After Verdict on Inquisition.—The Penal Code also prescribes the procedure after verdict of a jury on the question of insanity.⁸⁻⁹ By code provision the county is made chargeable with the expenses of sending the defendant to the state hospital and of keeping him there.¹⁰

The effect of the verdict finding the defendant insane and of the order of commitment is only to suspend the proceedings until such time as the prisoner might recover his sanity.¹¹ It is not necessary that the verdict finding a defendant insane be vacated by another trial on the same subject before the court can proceed with the trial of the guilt or innocence of the defendant.¹² But if there is still doubt as to his sanity, the court must proceed as at first and try the question anew as often as occasion may require. On such trials, the former verdict is conclusive of the defendant's insanity at the time of its rendition, and it may be given in evidence as tending to prove present insanity.¹³

II. TIME OF TRIAL AND POSTPONEMENT.

In General.

§ 274. Defendant's Right—Order of Trial of Offenses. A defendant has a constitutional right to a speedy trial,¹⁴ and to time to prepare his defense.¹⁵ Although a trial

8-9. Pen. Code, §§ 1370-1372. See Pen. Code, § 1371, as to effect of commitment exonerating the bail. See *HABEAS CORPUS* as to remedy where superintendent refuses to certify to defendant's sanity.

10. Pen. Code, § 1373; *Napa State Hospital v. Yuba County*, 138 Cal. 378, 71 Pac. 450 (holding statute constitutional and in force). See *Napa State Hospital v. County of*

Solano, 4 Cal. App. 510, 512, 88 Pac. 501, construing this section in connection with section 1368 before its amendment in 1905.

11. *People v. Kelley*, 7 Cal. App. 554, 95 Pac. 45.

12. *People v. Farrell*, 31 Cal. 576.

13. *People v. Farrell*, 31 Cal. 576.

14. See *infra*, § 276 et seq.

15. See *infra*, § 275.

should not be had upon a holiday, the defendant may waive the right to object to his trial proceeding into Saturday afternoon, conceding that to be a legal holiday.¹⁶ If a case should be set for trial on a legal holiday, it may be tried on the next following business day without resetting, as the code authorizes the performance of an act on the next business day when the day of performance falls upon a holiday.¹⁷

Order of trial of offenses.—The following provisions of the code prescribe the duties of the clerk in reference to the calendar, and the order of trial of offenses:

“The clerk must keep a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment or information, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail.”¹⁸

“The issues on the calendar must be disposed of in the following order, unless for good cause the court shall direct an action to be tried out of its order: 1. Prosecutions for felony, when the defendant is in custody. 2. Prosecutions for misdemeanor, when the defendant is in custody. 3. Prosecutions for felony, when the defendant is on bail. 4. Prosecutions for misdemeanor, when the defendant is on bail.”¹⁹

§ 275. Time to Prepare Defense.—A defendant and his counsel are entitled to a reasonable opportunity in which to prepare for trial. While the state should administer justice without delay, it is said to be beneath its dignity, at the instance of public clamor or other causes, to act with unseemly haste.²⁰ The right to counsel would

16. *People v. Maljan*, 34 Cal. App. 384, 167 Pac. 547. See *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543, holding it safer for the court to treat Saturday afternoon as a legal holiday until the question has been determined. See HOLIDAYS.

17. *People v. Rader*, 136 Cal. 253, 141 Pac. 958, citing Civ. Code, § 11.

18. Pen. Code, § 1047.

19. Pen. Code, § 1048.

20. *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944.

be a meaningless formality if he were denied sufficient time in which to prepare the case.¹ Hence, the code provides that "After his plea, the defendant is entitled to at least two days to prepare for trial."² A defendant charged with a grave offense may well be allowed ten, twenty, or thirty days to prepare his defense, although limiting him to a less period does not ipso facto furnish sufficient ground for reversal.³ If he goes to trial on the day fixed without objection, it will be conclusively presumed that he was ready.⁴

Speedy Trial.

§ 276. **In General.**—The constitution and statutes of California guarantee to every person charged with crime the right to a speedy trial.⁵ To satisfy this right it is not required that the trial take place immediately upon the finding or filing of the indictment or information; it is required rather that it take place with all convenient dispatch. It implies the existence of courts in which a trial may be had, and imposes upon the state the duty of providing courts which, under ordinary conditions, can furnish a speedy trial. It also implies reasonable time for the state to provide courts and juries and to procure witnesses.⁶ The function of this guaranty is only to protect those accused of crime against possible delay, caused by willful oppression or neglect of the state or its officers.⁷

1. *Shaffer v. Territory*, 14 Ariz. 329, 333, 127 Pac. 746.

2. Pen. Code, § 1049.

3. *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944, in which a judgment of conviction was affirmed notwithstanding the defendant charged with murder was allowed only three days to prepare his defense.

4. *People v. Winthrop*, 118 Cal.

85, 50 Pac. 390, where seventeen days were allowed the defendant.

5. Const., art. I, § 13; Pen. Code, § 686, subd. 1; *In re Begerow*, 136 Cal. 293, 56 L. R. A. 528, 68 Pac. 773; *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

6. *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009.

7. *In re Begerow*, 133 Cal. 349, 355, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828.

The legislature has laid down in the following code provisions a rule by which the constitutional provision may be interpreted, and provided a means for its enforcement:

“The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: 1. When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter.⁸ 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information.”⁹

“If the defendant is not charged or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued.”¹⁰

“If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.”¹¹

The effect of the latter portion of section 1382 is imperatively to fix the time as sixty days after the finding of the indictment or filing of the information within which, under the constitutional guaranty, a defendant must be brought to trial, and to declare that the guarantee is violated and the defendant is entitled to a dismissal of the prosecution if not brought to trial within that time, unless good cause for not doing so is shown, or the postponement

8. Pen. Code, § 1382. See INDICTMENT AND INFORMATION, as to time to find or file indictment or information.

9. Pen. Code, § 1382; *People v. Moran*, 144 Cal. 48, 56, 77 Pac. 777;

People v. Buckley, 116 Cal. 146, 47 Pac. 1009.

10. Pen. Code, § 1383.

11. Pen. Code, § 1384. The words “prosecution” and “action” in these sections are used synonymously. *Ex parte Clarke*, 54 Cal. 412.

of his trial beyond that period is made upon his application.¹²

Where defendant is at large on bail.—The constitutional guaranty is applicable to defendants at large upon bail, as well as those in prison.¹³

§ 277. Effect of Mistrial or New Trial or New Indictment or Information.—While the constitutional guaranty is general in its terms and applies to all time during which an accused is subject to trial,¹⁴ it will be noted that the code provision fixes a specific time beginning with a specific event, namely, the finding or filing of an indictment or information, within which a trial must be had unless good cause to the contrary is shown. Accordingly, it has been contended that the code is satisfied if an accused person is tried within the time limited and that it has no further application where a new trial is granted by the superior court or obtained upon appeal. Although this contention is supported by decisions in other jurisdictions, the rule in California is that the defendant must be brought to trial the first time within sixty days after the finding or filing of the indictment or information, and thereafter within sixty days from the first trial, if that trial results in a disagreement of the jury, or within sixty days after the return of the remittitur, if a new trial be awarded by an appellate court.¹⁵ At all events, a mis-

12. In the Matter of Ford, 160 Cal. 334, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, 116 Pac. 757; Ex parte Begerow, 133 Cal. 349, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828; People v. Morino, 85 Cal. 515, 24 Pac. 892; Ford v. Superior Court, 17 Cal. App. 1, 118 Pac. 96.

13. In the Matter of Ford, 160 Cal. 334, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, 116 Pac. 757;

Ford v. Superior Court, 17 Cal. App. 1, 7, 118 Pac. 96.

14. In re Begerow, 133 Cal. 349, 356, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828.

15. People v. Chadwick, 143 Cal. 116, 76 Pac. 884; In re Begerow, 136 Cal. 293, 56 L. R. A. 528, 63 Pac. 773; In re Begerow, 133 Cal. 349, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828 (McFarland, J., and Garoutte, J., dissent-

trial¹⁶ or the granting of a new trial,¹⁷ constitutes good cause for delay in the trial of the defendant.

New indictment or information.—The thirty-day limitation upon the finding or filing of an indictment or information has no application to a case where a demurrer to an indictment or information has been sustained and the prisoner is remanded to custody to await the action of a subsequent grand jury,¹⁸ or a new information.¹⁹ It is an open question in California whether the time of the trial is to be computed from the filing of the original or of a new information, in case the original has been held defective.²⁰

§ 278. Permissible Delays.—What is “good cause” for delay within the meaning of section 1382 of the Penal Code may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. The matter rests largely in the discretion of the trial court.¹ However, this discretion is not arbitrary but should proceed upon such knowledge or information as will enable the court to determine for itself whether public

ing); *Ex parte Ross*, 82 Cal. 109, 22 Pac. 1086; *Application of Yung*, 7 Cal. App. 772, 96 Pac. 24. Compare *People v. Lundin*, 120 Cal. 308, 52 Pac. 807, holding that the provision of the statute does not apply where a defendant has appealed and his case has been sent back for a new trial. And see *People v. Giese*, 63 Cal. 345, holding that Pen. Code, § 1382, has no application to a case where the defendant demurs and the effect of the ruling has to be corrected on appeal, and that he is not entitled to his discharge where the time of trial is fixed on a day more than sixty days after remittitur filed.

16. *In re Begerow*, 133 Cal. 349, 356, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828; *People v. Maupins*, 30 Cal. App. 392, 158 Pac. 502.

17. *People v. Lundin*, 120 Cal. 308, 52 Pac. 807.

18. *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *People v. Quijada*, 154 Cal. 243, 97 Pac. 689.

19. *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028.

20. *People v. Holmes*, 13 Cal. App. 212, 109 Pac. 489.

1. *People v. Farrington*, 140 Cal. 656, 74 Pac. 288; *Ex parte Bull*, 42 Cal. 196.

justice requires further detention of the prisoner notwithstanding the delay on the part of the prosecution.²

A delay in finding or filing an indictment or information is sufficiently excused where it is shown that an important witness was unable to attend the session of the grand jury,³ or that the delay arose from a natural mistake caused by an error of the official reporter of one day in stating the date of the preliminary examination.⁴ But a mere recommendation of the grand jury that the prisoner be detained⁵ or a mere failure of the magistrate to return the papers in the case as required by section 883 of the Penal Code,⁶ is not "good cause" for refusing to dismiss the prosecution. If the grand jury has dismissed a charge against a defendant the court must dismiss the action at the end of the period limited, unless it has reason to believe a subsequent jury may properly indict him.⁷

A delay in the trial of a defendant is sufficiently excused when caused by the illness of the trial judge,⁸ or district attorney,⁹ and by the engagement of the court in the trial of other cases.¹⁰ While it has been suggested that a mere statement of a judge that he has been otherwise engaged does not show good cause for delay,¹¹ this

2. *Ex parte Bull*, 42 Cal. 196.

3. *People v. Quijada*, 154 Cal. 243, 97 Pac. 689.

4. *People v. Farrington*, 140 Cal. 656, 74 Pac. 288.

5. *Ex parte Bull*, 42 Cal. 196.

6. *People v. Wickham*, 113 Cal. 283, 48 Pac. 123.

7. *Ex parte Clarke*, 54 Cal. 412. See INDICTMENT AND INFORMATION as to resubmission of charge to grand jury.

8. *People v. Camilo*, 69 Cal. 540, 11 Pac. 128.

9. *People v. Rongo*, 169 Cal. 71, 145 Pac. 1017, where the district attorney was ill and had no deputy,

and no attorney was available who knew the facts.

10. *People v. Rongo*, 169 Cal. 71, 145 Pac. 1017; *People v. Bene*, 130 Cal. 159, 62 Pac. 404; *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305 (where the continuance was caused by other criminal cases which had precedence); *People v. Henry*, 77 Cal. 445, 19 Pac. 830; *People v. Camilo*, 69 Cal. 540, 11 Pac. 128; *Murphy v. Superior Court*, 35 Cal. App. Dec. 286, 200 Pac. 483; *People v. Holmes*, 13 Cal. App. 212, 109 Pac. 489.

11. *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009, per Temple, J.

suggestion does not seem to have been followed in later decisions.¹² Moreover, it has been held that a defendant whose trial is necessarily delayed by unusual conditions is not entitled to complain that a greater number of the departments of a superior court are not assigned for criminal causes than usually suffice.¹³ The absence of a material witness for the prosecution is good cause for refusing to dismiss a prosecution under section 1382 of the Penal Code,¹⁴ provided diligence to procure his attendance is shown,¹⁵ and it appears that his attendance can be secured within such time as to prevent an unreasonable delay in the trial of the case.¹⁶ Of course, under the familiar maxim that no one can take advantage of his own wrong, a showing that the absence of an adverse witness was instigated or knowingly aided and abetted by a defendant would be ample justification for prolonged continuances, in aid of a bona fide endeavor to apprehend a defaulting

12. *People v. Holmes*, 13 Cal. App. 212, 109 Pac. 489, for example, arose in a county having several departments in its superior court. The entry in the minutes of the trial court recited, "and the time of the court having been occupied with other matters," and it was held that an affidavit showing this fact showed "good cause to the contrary" within the meaning of the code. So also in *People v. Benc*, 130 Cal. 159, 62 Pac. 404, although the attorney general pointed out in his brief that the superior court in question had but one department, the supreme court announced broadly that "the fact that the court was engaged in the trial of another cause was good cause for excluding the time the court was so engaged from the statutory period of sixty days."

13. *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

14. *Strong v. Grant*, 99 Cal. 100, 104, 33 Pac. 733, per Beatty, C. J., concurring.

15. *People v. Buckley*, 116 Cal. 146, 47 Pac. 1009; *Cordts v. Superior Court*, 35 Cal. App. Dec. 703, 200 Pac. 726 (holding a second continuance because of the absence of a material witness for the prosecution is unauthorized where he was not subpoenaed and no order of court to attend the court was issued or served upon him); *Ford v. Superior Court*, 17 Cal. App. 1, 11, 118 Pac. 96 (holding that the state was not free from neglect where it had not subpoenaed its witness prior to his departure from the state).

16. *Abbott v. Superior Court*, 17 Cal. App. 13, 118 Pac. 100; *Ford v. Superior Court*, 17 Cal. App. 1, 10, 118 Pac. 96.

witness, which in all likelihood will result in his return to the jurisdiction of the court.¹⁷

§ 279. Delay Requested or Consented to by Accused.—By the express terms of section 1382 of the Penal Code, a criminal prosecution of a defendant will not be dismissed for delay in trying a defendant, if the postponement was had upon his application. It has been held that the consent of a defendant to continuances leaving an unexplained delay of less than sixty days,¹⁸ or a consent that the trial be set for a date beyond the sixty day limit,¹⁹ is equivalent to a postponement upon his application within the meaning of the code, or at least it is sufficient excuse for the delay.²⁰ So also it has been held that an objection by a defendant to the setting of his case for trial, is equivalent to a delay at his request and is presumably for his benefit.¹ The fact that one jointly charged with another demands a separate trial is good cause for a postponement of his trial to a date when it might safely be assumed that the trial of the codefendant would be concluded.²

§ 280. Remedies for Delay.—A defendant entitled to a dismissal of a criminal prosecution must demand it, for the reason that his right thereto, like other statutory privileges which do not affect the jurisdiction of the court, may be waived.³ He must, in the first instance, assert

17. *Ford v. Superior Court*, 17 Cal. App. 1, 12, 118 Pac. 96.

18. *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884; *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v. Bell*, 4 Cal. Unrep. 522, 36 Pac. 94; *People v. Peter*, 20 Cal. App. 151, 128 Pac. 415; *People v. Holmes*, 13 Cal. App. 212, 109 Pac. 489.

19. *People v. Rongo*, 169 Cal. 71, 145 Pac. 1017; *People v. Dyer*, 26 Cal. App. 429, 147 Pac. 217; *People*

v. Holmes, 13 Cal. App. 212, 109 Pac. 489; *People v. Claudius*, 8 Cal. App. 597, 97 Pac. 687.

20. *People v. Benc*, 130 Cal. 159, 62 Pac. 404.

1. *People v. Cline*, 74 Cal. 575, 16 Pac. 391.

2. *People v. Moran*, 144 Cal. 49, 77 Pac. 777.

3. *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697 (cited with approval in *People v. Fitzgerald*, 137

his right in the court where the prosecution against him is pending, by motion under section 1382 of the Penal Code,⁴ made before he has been brought to trial.⁵ It is sufficient for the defendant to show that the time fixed by the statute has expired and, if the application is based upon subdivision two of section 1382, that the case has not been postponed on his application. If there is any good cause for holding him for a longer time without a trial, it is for the prosecution to show it. There is no presumption in such case, at least in the trial court, that the court has acted regularly, or that good cause exists.⁶

When motion is made, and no sufficient cause for delay is shown, the trial court has no discretion in the matter, but must dismiss the prosecution.⁷ If the trial court should improperly deny the motion, the defendant may invoke the remedy of habeas corpus before judgment of conviction,⁸ unless he has been admitted to bail, or his surrender by his sureties is self-invited. In that event his

Cal. 546, 550, 70 Pac. 554); *Folsom v. Conklin*, 3 Cal. App. 480, 86 Pac. 724, applying rule to prosecution under section 772 of the Penal Code.

4. *Ex parte Fennessy*, 54 Cal. 101, holding an application to another court for release upon habeas corpus is not a proper remedy in the first instance.

5. *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697 (holding that a motion made after a jury is impaneled and sworn comes too late).

6. In *re Begerow*, 133 Cal. 349, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828; *People v. Wickham*, 113 Cal. 283, 48 Pac. 123; *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *Cordts v. Superior Court*, 35 Cal. App. Dec. 703, 200 Pac. 726.

7. In *the Matter of Ford*, 160 Cal. 334, Ann. Cas. 1912D, 1267,

35 L. R. A. (N. S.) 882, 116 Pac. 757; *People v. Staples*, 91 Cal. 23, 29, 27 Pac. 523; *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

8. In *the Matter of Ford*, 160 Cal. 334, 339, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, 116 Pac. 761 (disapproving *Ex parte Strong*, 3 Cal. Unrep. 706, 31 Pac. 574, which denied the writ on the ground that the imprisonment was lawful until the information was dismissed. This doctrine, while supported by decisions of other states, is opposed to the rule in California); In *re Begerow*, 133 Cal. 349, 353, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828; S. C., 136 Cal. 293, 56 L. R. A. 528, 68 Pac. 773; *People v. Douglass*, 100 Cal. 1, 6, 34 Pac. 490 (per *De Haven, J.*, concurring); *Ex parte Vinton*, 5 Cal. Unrep. 624, 47 Pac. 1019.

remedy is by petition for a writ of mandate compelling the trial court to dismiss the prosecution.⁹ Of course, such writ will issue only where there is an entire absence of any showing constituting good cause presented on the hearing of the motion. And the writ will be denied, if the evidence on that subject was conflicting, or if, on the conceded facts in evidence, a reasonable deduction therefrom would support the action of the trial court in denying the motion. The defendant cannot appeal directly from the order refusing to dismiss, as such order is not final.¹⁰ While this order may be reviewed upon appeal from a judgment of conviction, if the defendant is subsequently tried and convicted, this remedy is inadequate, as the defendant may never be brought to trial.¹¹ Moreover, it has been suggested that a judgment should not be reversed upon appeal for a refusal to dismiss the proceeding, even though the court erred in its order, except where, if the motion had been granted, the statute of limitations would have been a bar to a new indictment or information for the same offense.¹²

Continuances and Adjournments.

§ 281. In General.—"When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another

9. In the Matter of Calhoun, 160 Cal. 807, 116 Pac. 763; In the Matter of Abbott, 160 Cal. 806, 116 Pac. 763; In the Matter of Mullally, 160 Cal. 805, 116 Pac. 763; In the Matter of Ford, 160 Cal. 334, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, 116 Pac. 757 (overruling Strong v. Grant, 99 Cal. 100, 33 Pac. 733); Ford v. Superior Court, 17 Cal. App. 1, 118 Pac. 96.

10. In the Matter of Ford, 160 Cal. 334, Ann. Cas. 1912D, 1267,

35 L. R. A. (N. S.) 882, 116 Pac. 757.

11. In the Matter of Ford, 160 Cal. 334, 345, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, 116 Pac. 757; Strong v. Grant, 99 Cal. 100 (per Beatty, C. J., concurring).

12. People v. Bell, 4 Cal. Unrep. 522, 36 Pac. 94 (per De Haven, J., concurring); People v. Douglass, 100 Cal. 1, 6, 34 Pac. 490 (per De Haven, J., concurring).

day.”¹³ Necessarily, a trial court is allowed much discretion in the matter of granting or refusing applications for such postponements or continuances, and its action thereon will not be disturbed upon appeal unless there has been a plain abuse of that discretion.¹⁴

Adjournment of trial.—It is within the discretion of the trial court to grant a temporary adjournment of the trial of the cause.¹⁵ For example, the court may allow the defendant time in which to prepare his defense after the prosecution has rested his case.¹⁶ Or it may temporarily adjourn the trial to permit defendant’s counsel to consult with his client, before cross-examining a witness who had taken counsel by surprise.¹⁷ But a refusal of an adjournment because of the absence of a witness whom counsel wished to examine in a prearranged order is not error where the defendant was not deprived of any testimony and the disarrangement of the order planned did not result in prejudice.¹⁸

Adjournment of court during deliberation of jury.—“While the jury are absent the court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.”¹⁹

13. Pen. Code, § 1052.

14. *People v. Russell*, 156 Cal. 450, 456, 105 Pac. 416; *People v. Totman*, 135 Cal. 133, 67 Pac. 51; *People v. Warren*, 130 Cal. 678, 63 Pac. 87; *People v. Leong Yune Gun*, 77 Cal. 636, 20 Pac. 27; *People v. Collins*, 75 Cal. 411, 17 Pac. 430; *People v. Gaunt*, 23 Cal. 156; *People v. Logan*, 4 Cal. 189; *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65; *People v. Kitley*, 33 Cal. App. 197, 164 Pac. 609. See note, 5 A. L. R. 914, as to refusal of continuance asked for on account

of occurrences during trial as abuse of discretion.

15. *People v. Shaw*, 111 Cal. 171, 43 Pac. 593. See *infra*, § 421.

16. *People v. Owens*, 132 Cal. 469, 64 Pac. 770.

17. *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484 (holding it was not error to grant a recess for ten minutes and refuse a recess until the next day).

18. *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484; *People v. Carnes*, 33 Cal. App. Dec. 121, 192 Pac. 1088.

19. Pen. Code, § 1142.

§ 282. **Grounds for Continuances Generally.**—It is within the jurisdiction of the trial court to determine what constitutes sufficient cause for a continuance.²⁰ It may grant a continuance because of the absence of a material witness,¹ and for absence of counsel.² And it may well grant a continuance until the reporter files a transcript of the testimony taken at the preliminary examination.³ It has been suggested that the introduction of a witness whose name was not indorsed on the indictment may be ground for a continuance in case it operates as a surprise upon the defendant. However this may be, such introduction does not entitle the defendant to a continuance as a matter of right.⁴ While a trial must be suspended until the determination of the issue of present insanity of the defendant,⁵ the court need not postpone the trial on the main charge pending an appeal on the issue of insanity.⁶ And it is within the discretion of the trial court to refuse a continuance on the ground that prior engagements of counsel were such as to prevent him from making due preparations for the trial.⁷

§ 283. **Absence of Counsel.**—Excusable absence of counsel is a good cause for postponement of the trial, particularly so in a capital case.⁸ The trial court is not, however, required to wait indefinitely for the return of defendant's counsel before proceeding with the trial.⁹ In

20. Application of Yung, 7 Cal. App. 772, 96 Pac. 24. As to grounds for continuances in civil cases, see CONTINUANCE, vol. 5, p. 962.

1. See *infra*, § 258.

2. See *infra*, § 283.

3. People v. Treschenko, 159 Cal. 456, 114 Pac. 578.

4. People v. Symonds, 22 Cal. 348 (limiting People v. Freedland, 6 Cal. 96, and stating that the remark of the court was obiter).

5. See *supra*, § 270.

6. People v. Moice, 15 Cal. 329.

7. People v. Collins, 75 Cal. 411, 17 Pac. 430.

8. People v. Logan, 4 Cal. 188, reversing judgment because of refusal to postpone trial on the ground of illness of senior counsel to whom had been intrusted the chief care and management of the case. See for rule in civil cases, CONTINUANCE, vol. 5, p. 982.

9. People v. Russell, 156 Cal. 450, 105 Pac. 416; People v. Goldenson, 76 Cal. 328, 341, 19 Pac. 161 (hold-

such case, all the defendant is entitled to, as a matter of right, is a reasonable time to have other counsel become familiar with the facts of the case.¹⁰ If he does not request time to procure other counsel, and declines an offer of the court to appoint counsel for him, he cannot complain that he was not represented by counsel.¹¹ Or if the court should appoint counsel for him, he cannot complain that he was deprived of counsel of his own choosing, especially when it does not appear that he was prejudiced in any way.¹² If insanity is relied upon as a defense, the court may appoint attorneys for the defendant, notwithstanding the fact that he declines the court's offer to do so.¹³

Attendance of counsel upon legislature.—While it is provided by the code that “a trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this state as a member thereof,”¹⁴ it is doubtful whether this provision applies to criminal prosecutions. However this may be, a continuance will not be granted under this section because of absence of counsel, unless it appears that counsel's engagement as attorney was made before the commencement of the session of the legislature.¹⁵

§ 284. Application.—An application for a continuance should be made by motion, supported by affidavits stating the facts upon which it is based,¹⁶ made when the action

ing that refusal of postponement was proper where counsel was unable to state how long before the probate case in which he was engaged would be concluded, but stated it would take several weeks).

10. *People v. Warren*, 130 Cal. 678, 63 Pac. 87.

11. *People v. Russell*, 156 Cal. 450, 105 Pac. 416.

12. *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442.

13. *People v. Goldenson*, 76 Cal. 328, 341, 19 Pac. 161.

14. Code Civ. Proc., § 595.

15. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

16. *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868. See CONTINUANCE, vol. 5, p. 995.

"is called for trial or at any time previous thereto." An application made after the impanelment of the jury is not seasonably presented, if no cause is shown why it was not made earlier.¹⁷ If surprise by an unexpected witness is relied on, the application should be supported by an affidavit showing such surprise.¹⁸ It has been held that an application for a continuance to procure additional counsel is insufficient where the affidavit states merely that a relative of the defendant is endeavoring to procure the services of an attorney other than those appointed by the court.¹⁹

Counter-affidavits.—It seems that the prosecution may file counter-affidavits controverting statements in the defendant's affidavits.²⁰

Continuance to Secure Attendance of Witnesses.

§ 285. **In General.**—A defendant in a criminal action is undoubtedly entitled to the personal attendance of his witnesses at the trial, if obtainable without unreasonable delay,¹ and to a continuance to procure their attendance when he makes a sufficient showing therefor.² A postponement of the trial may be granted to the people for the same reason.³

17. *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Beam*, 66 Cal. 394, 5 Pac. 677; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59; *People v. Ponchette*, 30 Cal. App. 399, 158 Pac. 338; *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572 (holding an application after the close of the case for the people is not seasonable).

18. *People v. Symonds*, 22 Cal. 348.

19. *People v. Putman*, 129 Cal. 258, 61 Pac. 961.

20. See *People v. Sprague*, 53

Cal. 422, 491, holding the motion was properly denied upon the affidavit of the prosecution. See CONTINUANCE, vol. 5, p. 1004.

1. *People v. Dodge*, 28 Cal. 445.

2. *People v. McCrory*, 41 Cal. 458; *People v. Diaz*, 6 Cal. 248; *People v. Lee*, 2 Cal. Unrep. 569, 8 Pac. 685; *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105. As to this being a ground in civil cases, see CONTINUANCE, vol. 5, p. 990.

3. *People v. Treadwell*, 69 Cal. 226, 239, 10 Pac. 502.

When a continuance is sought because of the absence of a witness, it is necessary that the evidence sought be material,⁴ that the applicant be guilty of no neglect,⁵ and that the witness can be had at the time to which the trial is deferred,⁶ and that the application be made in good faith and not for mere delay.⁷ The applicant should also, as a general rule, show that he cannot prove the facts set forth in the affidavit by any other witness;⁸ in other words, that the testimony is not cumulative merely, for ordinarily a trial will not be postponed for the purpose of obtaining cumulative evidence.⁹ This rule is by no means absolute, however, and it has no application to a case where the only evidence at hand is that of the defendant himself.¹⁰

By whom affidavit may be made.—An affidavit in support of a motion based upon the absence of a witness should be made by the defendant himself, or someone else who has direct knowledge of the facts. An attorney cannot, in the nature of things, be supposed to have cognizance of the witnesses to an alleged criminal transaction or of the facts which they can prove in relation to it, except so far as he may have been informed thereof by his client.¹¹

§ 286. Materiality of Evidence.—To warrant a continuance on the ground of the absence of a witness, it should

4. See *infra*, § 286.

5. See *infra*, § 288.

6. *Ford v. Superior Court*, 17 Cal. App. 1, 118 Pac. 96. See *infra*, § 287.

7. *People v. Putnam*, 129 Cal. 258, 61 Pac. 961; *People v. Jenkins*, 56 Cal. 4; *People v. Mortimer*, 46 Cal. 114; *People v. De Lacey*, 28 Cal. 589; *People v. Thompson*, 4 Cal. 238.

8. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341; *People v. Lang*, 142 Cal. 482, 76 Pac. 232; *People*

v. Ah Fat, 48 Cal. 61; *People v. Ashnauer*, 47 Cal. 98; *People v. Mortimer*, 46 Cal. 114; *People v. Gaunt*, 23 Cal. 156; *People v. Quincy*, 8 Cal. 89; *People v. Thompson*, 4 Cal. 238; *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46.

9. *People v. Ah Lee Doon*, 97 Cal. 171, 177, 31 Pac. 933; *People v. Gaunt*, 23 Cal. 156; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59.

10. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933.

11. *People v. Jenkins*, 56 Cal. 4.

appear that the evidence is material,¹² and the affidavit in support of the motion must state what facts it is expected the witness will testify to in order that the court may determine its materiality.¹³ Merely to state that the testimony is material is insufficient.¹⁴ The court may deny a continuance to procure evidence which is wholly immaterial, except for purpose of impeachment in case of certain contingencies which might arise.¹⁵

If the witnesses are expected to testify as to the insanity of the defendant, the affidavit should show what their acquaintance or association was with the defendant, and what were their opportunities of observation of his conduct. It must also show what facts, if any, they would testify to, and show that the insanity to which they would testify is of such a character as to relieve the defendant of responsibility for the crime with which he is charged. If such evidence is addressed to a period some considerable time prior to the commission of the crime charged, there should be some showing that the evidence would not be too remote to be admitted in evidence, if procured. The mere fact that counsel has been informed that the defendant had been committed to an asylum is not sufficient to warrant a continuance, where he had ample time to obtain proof thereof but failed to exercise any diligence in this respect.¹⁶ It is not an abuse of discretion to deny a

12. *People v. Northey*, 77 Cal. 618, 628, 19 Pac. 865, 20 Pac. 129; *People v. Williams*, 43 Cal. 344; *People v. Mellon*, 40 Cal. 648; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59; *Ford v. Superior Court*, 17 Cal. App. 1, 118 Pac. 96. See CONTINUANCE, vol. 5, p. 991.

13. *People v. Fountain*, 170 Cal. 460, 466, 150 Pac. 341; *People v. Ah Fat*, 48 Cal. 61 (whether a reference to the reporter's notes of the testimony of the witness given at a former trial would suffice,

query); *People v. Baker*, 1 Cal. 403.

14. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341.

15. *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340.

16. *People v. Fountain*, 170 Cal. 460, 150 Pac. 341 (merely to show that counsel received letters from some parties "tending to show the insanity of the defendant" is insufficient where the letters do not accompany the affidavit, and where

continuance until the depositions of nonresident alienists based upon hypothetical questions can be obtained in support of the plea of insanity.¹⁷

§ 287. Procurability of Evidence.—The applicant for a continuance must also show that the attendance of the witnesses can be procured within a reasonable time if a continuance is granted.¹⁸ A continuance may be refused where the applicant does not state that he can procure evidence but “hopes to do so,”¹⁹ or where the witness is a fugitive from justice and could not probably be produced;²⁰ or where it appears that no one knows of the whereabouts of the witness and there is no apparent probability that any knowledge thereof will ever be obtained;¹ or generally, where it does not seem that the attendance of the alleged absent witness can be procured within a reasonable time.² If the witness is beyond the jurisdiction of the court, it should be made to appear with reasonable certainty that he will return to the jurisdiction within such reasonable time as to prevent an unusual delay in the trial of the cause.³ It is insufficient for the affidavit to state merely that the defendant is informed or believes

the facts mentioned in such letters are not stated in the affidavit).

17. *People v. Buck*, 151 Cal. 667, 91 Pac. 529.

18. *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340; *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Ah Fat*, 48 Cal. 61; *People v. Ashnauer*, 47 Cal. 98; *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46; *People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812; *People v. Sliger*, 17 Cal. App. 464, 120 Pac. 40; *People v. Barnnovich*, 16 Cal. App. 427, 431, 117 Pac. 572.

19. *People v. Loomis*, 170 Cal. 747, 149 Pac. 581.

20. *People v. Cleveland*, 49 Cal. 578; *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868.

1. *People v. Russell*, 156 Cal. 450, 456, 105 Pac. 416; *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

2. *People v. Wade*, 118 Cal. 672, 50 Pac. 841 (where the witness was believed to be in Mexico); *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490.

3. *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Ah Lee Doon*, 97 Cal. 171, 178, 31 Pac. 933; *Ford v. Superior Court*, 17 Cal. App. 1, 10, 118 Pac. 96.

that the witness will return, without also giving the sources, nature and particulars, of the information or assigning the reasons for defendant's belief that he will return.⁴

As a matter of course, the rule is applied with ever-increasing rigidity where repeated continuances are asked for. In such a case a stronger showing of diligence and certainty that the presence of the witness can be had is required in support of each successive application.⁵

§ 288. **Diligence.**—An applicant for a continuance must be guilty of no neglect in securing the attendance of the absent witness.⁶ He cannot rely upon a promise of the witness to be in attendance, if the witness is reachable by process of the court. Due diligence requires that the witness be subpoenaed or placed under an order of the trial court if his whereabouts are known.⁷ If the witness fails to obey the subpoena, due diligence requires an attachment if he is reachable thereby.⁸ If the whereabouts of the witness are unknown, it is not sufficient merely to place a subpoena in the hands of the sheriff. The defendant should personally cause an inquiry to be made as to the whereabouts of the witness or make some effort to locate him;⁹ and it is not sufficient merely to make a search at the witness' place of residence.¹⁰ If the witness resides in an adjoining county, the applicant must procure the issuance of a subpoena with a proper indorsement of the court thereon,¹¹ and this must be done a reasonable time before the trial.¹²

4. *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Ah Lee Doon*, 97 Cal. 171, 178, 31 Pac. 933; *People v. Francis*, 38 Cal. 183.

5. *Ford v. Superior Court*, 17 Cal. App. 1, 10, 118 Pac. 96.

6. *Ford v. Superior Court*, 17 Cal. App. 1, 118 Pac. 96.

7. *People v. Baker*, 1 Cal. 403; *Ford v. Superior Court*, 17 Cal. App. 1, 118 Pac. 96.

8. *Wilson v. Weaver*, 47 Cal. 106.

9. *People v. Sliger*, 17 Cal. App. 464, 120 Pac. 40.

10. *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

11. See *infra*, this section.

12. *People v. Quincy*, 8 Cal. 89.

Taking deposition of witness.—When the absent witness is ill, due diligence does not require that his deposition be taken, if the illness is believed to be temporary, and it is made to appear that his personal attendance can be secured without unreasonable delay.¹³ But it seems that the illness of a witness may be such as to require the taking of a deposition.¹⁴ If a material witness is without the state, a continuance may be granted if the defendant, relying upon his promise to attend trial and deeming his personal presence important, fail to take his deposition but can procure it before another trial.¹⁵

Affidavit.—The affidavit in support of the motion must contain a sufficient showing of diligence to secure the attendance of the absent witness.¹⁶ It is insufficient to state, merely the conclusion that the affiant has exercised every diligence in his power to procure the attendance of the witness, without stating the facts upon which the conclusion is based.¹⁷ The affidavit should show what the diligence consisted of, whether by exhausting the process of the court or otherwise.¹⁸ If the witness had been served with a subpoena within the county, it should be shown that he cannot be reached by attachment.¹⁹ If he resides out of the county, the affidavit must show that a subpoena for him with a proper indorsement thereon, was issued,

13. *People v. Dodge*, 28 Cal. 445.

14. See *People v. Beam*, 66 Cal. 394, 5 Pac. 677, not deciding the point.

15. *People v. Brown*, 46 Cal. 102.

16. *People v. Loomis*, 170 Cal. 347, 149 Pac. 581; *People v. Lang*, 142 Cal. 482, 488, 76 Pac. 232; *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Putnam*, 129 Cal. 258, 61 Pac. 961; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Jenkin*, 56 Cal. 4; *People v. Ashnauer*, 47 Cal. 98; *People*

v. Burke, 34 Cal. 661; *People v. Jocelyn*, 29 Cal. 562; *People v. Williams*, 24 Cal. 31, 38; *People v. Vanard*, 6 Cal. 562; *People v. Baker*, 1 Cal. 403. And see CONTINUANCE, vol. 5, p. 995.

17. *People v. Sliger*, 17 Cal. App. 464, 120 Pac. 40; *People v. Thompson*, 4 Cal. 238.

18. *People v. Thompson*, 4 Cal. 238.

19. *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340; *People v. Weaver*, 47 Cal. 106.

or state a valid excuse for not obtaining such subpoena.²⁰ An affidavit which states that the attorney made diligent inquiry at a place should show whether any one heard the inquiry at a place should show whether anyone heard the

§ 289. Discretion — Length of Continuance. — Applications for continuances upon the ground of absence of witnesses, like applications for continuances generally, rest very much in the discretion of the trial court, and its action will not be disturbed upon appeal in the absence of a plain case of abuse of discretion.² Great liberality should be extended toward persons charged with crime in preparing their defenses and particularly in procuring the attendance of witnesses, but, it is declared, the rule must not be so relaxed as to defeat the ends of justice.³

Length of continuance. — The question as to what constitutes a reasonable continuance for the purpose of securing the personal attendance of a sick or absent witness is one necessarily resting largely within the discretion of the court.⁴ While it is perhaps unusual after the commencement of a trial to continue a case more than fifteen days to take a deposition, the defendant cannot complain unless he is prejudiced thereby.⁵ Yet it has held that it is an abuse of discretion, after the jury has been impaneled,

20. *People v. Lampson*, 70 Cal. 204, 11 Pac. 593; *People v. Jocelyn*, 29 Cal. 562; *People v. Williams*, 24 Cal. 31, 37.

1. *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

2. *People v. Russell*, 156 Cal. 450, 456, 105 Pac. 416; *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340; *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Treadwell*, 69 Cal. 226, 239, 10 Pac. 502; *People v. Gaunt*, 23 Cal. 156; *People v. McDonald*, 1 Cal. Unrep.

437; *People v. Ponchette*, 30 Cal. App. 399, 158 Pac. 338. And see CONTINUANCE, vol. 5, p. 968.

3. *People v. Francis*, 38 Cal. 183.

The mere statement of the prosecuting attorney that he has information the absent witness is not ill will not justify a refusal of the continuance. *People v. Plyler*, 121 Cal. 160, 164, 53 Pac. 553.

4. *People v. Dinsmore*, 102 Cal. 381, 36 Pac. 661.

5. *People v. Elgar*, 39 Cal. App. 78, 178 Pac. 168.

and during the trial, to grant a continuance for a period in excess of two months.⁶

§ 290. Denial upon Admission of Facts.—An application of a defendant for a continuance to secure the attendance of witnesses may be denied if the district attorney admits the facts which the defendant expects to prove by the absent witness,⁷ in which case the facts admitted are to be considered for all the purposes of the trial in the same light as if they had been proved by testimony.⁸ To authorize such denial of a continuance the admission must be an admission of the truth of the facts expected to be proved by the absent witness, not merely that the witness would testify to the facts stated,⁹ and it must be as broad as the affidavit and cover all the material facts expected to be proved.¹⁰ As stated in an early case: "It was the right of the accused to have his witnesses orally examined in court; and this right could not be frittered away by compelling him to go to trial in their absence, without the benefit of their testimony, upon a statement of what that evidence would be, subject to impeachment. The value of oral testimony, over all other, is too well understood to suppose, for a moment, that such declarations would have the same weight on the minds of the jury as the testimony of the witness, if he had been examined before them in open court."¹¹ Of course, if no sufficient showing to call for a continuance has been made, it is not error to deny it upon an admission that the witness would testify as alleged.¹²

6. *People v. Dinsmore*, 102 Cal. 381, 36 Pac. 661, followed in *People v. Logan*, 123 Cal. 414, 56 Pac. 56, holding it proper to deny an application of the defendant for a continuance of two months.

7. *People v. Brown*, 59 Cal. 345, 353.

8. *People v. Tyler*, 36 Cal. 522.

For application of the rule concerning admissions to civil cases, see *CONTINUANCE*, vol. 5, p. 1008.

9. *People v. Diaz*, 6 Cal. 248; *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105.

10. *People v. Brown*, 54 Cal. 243.

11. *People v. Diaz*, 6 Cal. 248.

12. *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

Introductory.

§ 291. **In General.**—Persons accused of crime are to be tried in accordance with forms of procedure in force when the trial takes place.¹³ While the conduct of trials in criminal cases rests largely in the discretion of the trial court, except as to matters regulated by the statute or the constitution, nevertheless, it has been repeatedly said that a court cannot be too careful to observe strictly the statutory provisions.¹⁴ Under the constitution, a defendant has a right to a public trial¹⁵ by a jury,¹⁶ and the right to appear and defend in person¹⁷ and with counsel.¹⁸

Circumstances transpiring after the jurors are sworn do not give either party the right to interrupt the trial for the purpose of re-examining the jurors as to bias or prejudice caused thereby.¹⁹ And the court may refuse to ask the jurors, during the taking of testimony, whether they have read any reports of the trial in the newspapers.²⁰

Handcuffing witnesses.—When a witness for the defendant is a prisoner in jail, it has been held that it is not prejudicial error for the sheriff to handcuff him immediately after the adjournment of the court and in the presence of the jury, especially where it does not appear that the officer was acting in bad faith, and where the jury are instructed to disregard the occurrence.¹

§ 292. **Presence of Judge and Defendant.**—The judge is a component part of the court and he cannot legally ab-

13. See *supra*, § 5.18. See *supra*, § 83.14. *People v. Coyne*, 116 Cal. 295, 48 Pac. 218; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Nichols*, 62 Cal. 518.19. *People v. Ruef*, 14 Cal. App. 576, 607, 114 Pac. 48, 54. See *JURY*.15. See *supra*, § 80.20. *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899.16. See *JURY*.17. See *supra*, §§ 75, 84.1. *People v. Metzger*, 143 Cal. 447, 77 Pac. 155. See *WITNESSES*.

sent himself from the courtroom during a trial so as to lose control of the proceedings.² Absences of the trial judge from the courtroom while the trial is in progress, however brief, cannot be safely indulged in.³ It is not sufficient merely that the judge should be within hearing. He should be visibly present every moment of the actual progress of a criminal trial. He cannot legally, therefore, retire to an adjoining room during the progress of the trial and close the door between even though he can hear all that is going on.⁴ The trial within this rule includes the argument of the case as much as the introduction of evidence.⁵ The necessity for the presence of the defendant is discussed elsewhere in this article.⁶

§ 293. Substitution of Judges.—It is irregular to substitute judges during the course of the trial of a criminal proceeding,⁷ except when authorized by statute, or consented to by the parties.⁸ The Penal Code authorizes a change of judges in cases where, after the commencement of the trial of a criminal action “the judge shall die, become ill, or for any other reason be unable to proceed with the trial.” In such event any other judge of the superior court of the county, or city and county, in which the case is pending may proceed with and finish the trial. If there be no other judge of such superior court, the clerk or sheriff shall adjourn the court and continue the case from day to day, until such time as the governor shall designate a judge of the superior court from some other county to proceed with and complete the trial, or until such time as, by stipulation in writing between the

2. *People v. Blackman*, 127 Cal. 248, 59 Pac. 573; *People v. Tupper*, 122 Cal. 424, 55 Pac. 125. See *supra*, § 78. And see *JUDGE*.

3. *People v. Grider*, 13 Cal. App. 703, 713, 110 Pac. 586.

4. *People v. Blackman*, 127 Cal. 248, 59 Pac. 573.

5. *People v. Tupper*, 122 Cal. 424, 55 Pac. 125.

6. See *supra*, § 75.

7. *People v. Eckert*, 16 Cal. 110.

8. *People v. Henderson*, 28 Cal. 465 (a prosecution for murder); *People v. Casselman*, 10 Cal. App. 284, 101 Pac. 693. See *infra*, § 443, as to motion for new trial.

district attorney and the attorney for the defendant, filed with the clerk, a judge shall be agreed upon by them to complete the trial.⁹ The provisions of section 1053 of the Penal Code are not mandatory, and it is permissible under it to substitute a judge from another county upon stipulation of counsel, in those counties where there are several judges in the superior court as well as where there are not.¹⁰

Where indictment against judge is found.—The code provides as follows:

“When an indictment is found or an information filed in a superior court against a judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who shall thereupon designate and direct a judge of the superior court of another county to preside at the trial of such indictment or information, and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment.”¹¹

§ 294. Presence of Counsel.—It is the duty of the district attorney to attend the courts, and conduct, on behalf of the people, all prosecutions for public offenses.¹² “If the district attorney fails to attend at the trial the court must appoint some attorney at law to perform the duties of the district attorney on such trial.”¹³ The latter provision is not exclusive, however, and the defendant has no ground of complaint if the place of the district attorney is

9. Pen. Code, § 1053 (stated in substance). “The judge authorized by the provisions of this section to proceed with and complete the trial shall have the same power, authority and jurisdiction as if the trial had been commenced before such judge.” See *People v. Mellon*, 40 Cal. 648, holding a statute which authorizes a county judge to hold

court for a county judge of another county is not unconstitutional.

10. *People v. Lichtenstein*, 22 Cal. App. 592, 609, 135 Pac. 692. See JUDGE.

11. Pen. Code, § 1029.

12. Pol. Code, § 4153. See DISTRICT AND PROSECUTING ATTORNEYS.

13. Pen. Code, § 1130.

otherwise supplied by counsel who are guilty of no prejudicial misconduct.¹⁴

The practice of allowing district attorneys to have the assistance of private counsel to assist in the prosecution of criminals has existed and has been acquiesced in almost since the organization of the state.¹⁵ The matter rests in the discretion of the trial court.¹⁶

Counsel for defense.—While the defendant has a constitutional right to have his counsel present during the trial, the right may be waived.¹⁷ Where the defendant's attorney is informed that the jury had come into court with a verdict, the court, after waiting a reasonable time for him to arrive, may receive the verdict, and poll and discharge the jury in his absence.¹⁸

§ 295. Presence and Exclusion of Witnesses.—It is within the discretion of the trial court upon motion of either party to exclude a witness or the witnesses of the adverse party from the courtroom to prevent the persons so excluded from hearing the testimony of witnesses under examination.¹⁹ While, strictly construed, the rule applies to the witnesses of the party adverse to the party making the request, liberally construed, it can and should be applied to a hostile witness who, in good faith, has

14. *People v. Walters*, 98 Cal. 138, 32 Pac. 864.

15. *People v. Turcott*, 65 Cal. 126, 3 Pac. 461.

16. *People v. Blackwell*, 27 Cal. 65; *People v. Lynch*, 1 Cal. Unrep. 444.

17. See *People v. Rice*, 73 Cal. 220, 14 Pac. 851 (holding that the absence of counsel at the time of the announcement of a ruling upon a demurrer is not ground for reversal in the absence of prejudice). See *supra*, § 83, as to right to aid of counsel; and *infra*, § 421, as to

presence of defendant's counsel when further instructions are given the jury.

18. *People v. Bennett*, 65 Cal. 267, 3 Pac. 868.

19. Code Civ. Proc., § 2043; *People v. Rogers*, 163 Cal. 476, 126 Pac. 143, 145; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Garnett*, 29 Cal. 622; *People v. Gasser*, 34 Cal. App. 541, 168 Pac. 157; *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283; *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

been subpoenaed to testify for either party. The mere fact that the presence of a witness would result in the intimidation of witnesses testifying does not require the exclusion of such witness. Yet if a sufficient showing is made, the trial court may in its discretion make an order covering the situation.²⁰

Excepting witnesses from order.—A court, when excluding witnesses, has power in its discretion to specially except one or more witnesses from the operation of the order,¹ or to refuse to do so.² For example, it may make an exception of any person who might be of aid to the prosecuting attorney in the matter of the marshaling of the proofs.³ Or it may except the sheriff or a police officer when he is a witness.⁴

Admonishing witnesses and enforcing order.—When excluding witnesses from the courtroom, the court should admonish them not to talk to others about their testimony, but this is a matter resting in the discretion of the court, and a refusal to do so is not ground for reversal in the absence of any showing of prejudice.⁵ If the witnesses disobey an order excluding them from the courtroom, they may be punished for contempt, but a party without fault cannot, because thereof, be deprived of their testimony.⁶

§ 296. Interpreter.—Under the code, when a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.⁷ The pro-

20. *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283.

1. *People v. McCarty*, 117 Cal. 65, 48 Pac. 984; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

2. *People v. Greening*, 26 Cal. App. 49, 146 Pac. 51.

3. *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

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4. *People v. Munley*, 142 Cal. 441, 76 Pac. 45; *People v. Garnett*, 29 Cal. 622.

5. *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325.

6. *People v. Boscovitch*, 20 Cal. 436.

7. Code Civ. Proc., § 1884. See WITNESSES.

priety of calling an interpreter is a question addressed to the judicial determination of the trial court,⁸ as is the matter of the fitness of the person called to act;⁹ and the action of the court will not be disturbed upon appeal unless the record shows an abuse of discretion. The proper time to question the qualifications of an interpreter is before he is permitted to act. Upon objection made afterwards, his translation will be considered to be accurate, unless there is sufficient showing made to overcome the presumption. A mere showing of inability to translate the oath to a subsequent witness is insufficient to show that the oath was not correctly interpreted to a prior witness.¹⁰ When the competency of the interpreter at the preliminary examination is questioned at the trial, his ability and accuracy at translation may be shown by examination of the interpreter or by competent independent evidence. But the court may refuse a request that he hold a conversation with a witness in the foreign tongue in the presence of the jury.¹¹ When the court allows the district attorney to have an interpreter to check the correctness of an interpreter of defendant's witnesses, it is not misconduct for the district attorney to interpose objections that the official interpreter is not correctly translating the questions or testimony.¹²

It is the duty of the interpreter to interpret and report to the court every statement made by a witness. And it has been held to be error for a court to instruct an interpreter that whenever a witness tells him something that

8. *People v. Mamilato*, 168 Cal. 207, 142 Pac. 58 (abuse of discretion not shown); *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Avila*, 33 Cal. App. Dec. 686, 194 Pac. 768 (discretion in refusing to call an interpreter held abused); *People v. Valencia*, 27 Cal. App. 407, 150 Pac. 68; *People v. Lopez*, 21 Cal. App. 188, 131

Pac. 104; *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295.

9. *People v. Valencia*, 27 Cal. App. 407, 150 Pac. 68; *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295.

10. *People v. Phillips*, 12 Cal. App. 760, 108 Pac. 731.

11. *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283.

12. *People v. Phillips*, 12 Cal. App. 760, 108 Pac. 731.

somebody else has told him, he should inform the court without repeating what the witness said, as an interpreter is not selected for the discharge of a duty essentially judicial.¹³

§ 297. Reading Accusation and Stating Pleas.—As the first step in the trial after the impaneling and swearing of the jury the code provides that

“If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with.”¹⁴

A failure of the clerk to read the indictment and state the pleas of the defendant, as required by this statute, is harmless, if their substance is fully stated to the jury during the trial.¹⁵ When reading the accusation, the clerk should read all of it, except the portion withdrawn as an issue by the admission of the defendant.¹⁶ He should read the aliases unless they are stated without reason and their reading would prejudice the defendant and prevent him from obtaining a fair trial. The mere fact that the defendant is charged with a conviction of prior offenses under pseudonyms and that he admits such prior convictions, does not make it error to read the pseudonyms.¹⁷

§ 298. Compelling Production or Inspection of Evidence. While it is the sworn duty of a district attorney fairly and impartially to prosecute persons accused of crime, and

13. *People v. Wong Ah Bang*, 65 Cal. 305, 4 Pac. 19.

14. Pen. Code, § 1093, subd. 1.

15. *People v. Sprague*, 53 Cal. 422, 491; *People v. Maughs*, 8 Cal. App. 107, 114, 96 Pac. 407 (where the clerk omitted to state all the

pleas but they were stated before any evidence addressed to them was tendered).

16. See *infra*, § 617.

17. *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097.

to protect the individual rights of an accused person as well as those of the people, there is no duty resting upon him to call and examine all the eye-witnesses to the crime,¹⁸ and a motion to compel the prosecution to do so may be denied.¹⁹ The district attorney need not introduce persons whose testimony he knows will be adverse to the theory of the people, nor is he required to produce all persons for whom he has caused subpoenas to be issued.²⁰ And the trial court may refuse to require him to produce an unsigned and unsworn statement of a witness when there is no good reason to believe that it would be admissible in evidence.¹ Furthermore, there is no duty, in law or in morals, requiring the district attorney to file the notes of conversations had with the defendant. If he offers them to defendant's counsel for inspection, that is all the defendant can in reason expect.²

While it is the duty of a court to compel a witness to answer a proper question, it is discretionary with the court whether to instruct a witness to ascertain facts during a recess, and a refusal to do so is not reviewable upon appeal.³ An expert who has been sworn as a witness can be required to answer such pertinent questions as might be put to him, notwithstanding they call for expert testimony and the expert is not recompensed or guaranteed compensation for his services as such. But the court cannot compel him to go to the trouble and perhaps some expense of making a scientific investigation for the purpose of qualifying himself to give expert testimony.⁴

18. *People v. Johnson*, 13 Cal. App. 776, 110 Pac. 965; *People v. Jim Ti*, 32 Cal. 60. See DISTRICT AND PROSECUTING ATTORNEYS. 1038, 192 Pac. 552; *People v. Burke*, 18 Cal. App. 72, 98, 122 Pac. 435; *People v. Edmons*, 7 Cal. App. 685, 95 Pac. 1032.

19. *People v. Robertson*, 67 Cal. 646, 8 Pac. 600.

2. *People v. Couture*, 171 Cal. 43, 151 Pac. 659.

20. *People v. Johnson*, 13 Cal. App. 776, 110 Pac. 965.

3. *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201.

1. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965; *People v. Fuski*, 60 Cal. Dec. 349, 32 Cal. App. Dec.

4. *People v. Conte*, 17 Cal. App. 771, 784, 122 Pac. 450, 457.

Inspection of papers offered in evidence.—If a witness is called to identify papers in order to lay the foundation for introducing them in evidence, the opposing counsel is entitled to an inspection of the papers before the close of the testimony, in order to enable him to offer testimony in explanation thereof, or to disprove their authenticity.⁵

§ 299. Physical Examination.—Since under the constitution a person charged with a crime cannot be compelled to be a witness against himself, a court cannot require a defendant in a criminal case, against his consent, to submit to an examination by a physician,⁶ although it may require him to stand up in the courtroom at the trial, for identification.⁷ While he may probably waive the right, the court may deny his motion to exhibit his unclad body to the jury to show he was physically deformed, where the exhibition would afford merely cumulative evidence of facts concerning which there is no dispute.⁸

Whether a court, upon defendant's motion, can compel an examination of the prosecuting witness or the child in a rape case, if they object seems doubtful. At any rate, a refusal to allow such an examination is not ground for reversal, if not prejudicial to the defendant.⁹

§ 300. Election Between Acts.—Upon a trial under an indictment or information charging one offense, in which evidence is introduced to prove two or more separate and distinct offenses, either one of which would support the charge, the prosecution, if requested, should be required, to inform the defense upon the proof of what specific offense it intends to rely for conviction.¹⁰ This rule is not

5. *People v. Stevens*, 52 Cal. 457.

6. *People v. Akens*, 25 Cal. App. 373, 143 Pac. 795.

7. See *supra*, § 230.

8. *People v. Loomer*, 13 Cal. App. 655, 110 Pac. 466.

9. *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112.

10. *People v. Williams*, 133 Cal. 165, 65 Pac. 323 (prosecution for rape upon a child in which several offenses were proved); *People v.*

applicable where two or more offenses are charged in the indictment or information as authorized by section 954 of the Penal Code,¹¹ or where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense,¹² or where the testimony relates to only one transaction and offense but admits of two theories of guilt,¹³ or where the testimony shows the defendant committed the crime with several weapons.¹⁴

Time of election.—The better course is to make this election between acts at the commencement of the trial.¹⁵ If the opening statement of the district attorney discloses that he expects to prove several offenses, the court should compel an election at the close of the opening statement.¹⁶ If an election is not made at that time, the first evidence which tends in any degree to prove an offense should be deemed a selection,¹⁷ and when the case goes to the jury, the court should in some form direct the minds of the jury to the particular offense which it is incumbent upon the state to establish.¹⁸ The purpose of the rule will be accomplished, if at any time before the case is submitted to

Castro, 133 Cal. 11, 65 Pac. 13; *People v. Ruiz*, 32 Cal. App. Dec. 995, 192 Pac. 327 (a prosecution for rape in which the evidence showed three assaults in one day); *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980; *People v. Simon*, 21 Cal. App. 88, 131 Pac. 102; *People v. Hatch*, 13 Cal. 521, 534, 109 Pac. 1097. See *supra*, § 176, admissibility of evidence of other offenses. See INDICTMENT AND INFORMATION, as to election between counts or offenses.

11. *People v. Murnahan*, 32 Cal. App. 211, 162 Pac. 422; *People v. Howard*, 31 Cal. App. 353, 369, 160 Pac. 697.

12. Thus, where under one agreement to procure a miscarriage, a

series of criminal acts on different days are done, all the acts constitute part of one transaction and an election is not required. *People v. Simon*, 21 Cal. App. 88, 131 Pac. 102.

13. *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324.

14. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74.

15. *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

16. *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879.

17. *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980.

18. *People v. Castro*, 133 Cal. 11, 65 Pac. 13.

the jury, the court informs them of the particular offense of which they are asked to find defendant guilty.¹⁹

Sufficiency of election.—The selection of the act upon which the prosecution intends to rely for conviction should be definite.²⁰ If the prosecution is unable to fix the date of the act selected, it may fix the date by reference to the circumstances accompanying the act.¹ If a specific act is alleged in the information and the district attorney apparently relies upon that, the defendant will be deemed to have waived a more definite selection if he does not demand it.²

Order of Proof.

§ 301. **In General.**—As the next step after the reading of the indictment or information and statement of the plea of the defendant, the code provides that

“ . . . The district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the charge. The defendant or his counsel may then open the defense, and offer his evidence in support thereof. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.”³

It is provided, however, that when the state of the pleadings requires it, or in any other case for good reasons, and in the sound discretion of the court, the order prescribed by section 1093 of the Penal Code may be departed from.⁴

19. *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

20. *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420 (holding it sufficient to select the first act of sexual intercourse between the parties occurring in the latter part of January or the first part of February and prior to the twentieth day of February).

1. *People v. Wademan*, 38 Cal. App. 116, 175 Pac. 791. See *infra*, § 375.

2. *People v. Mancuso*, 23 Cal. App. 146, 137 Pac. 278.

3. Pen. Code, § 1093 (subds. 2, 3, 4). See *infra*, § 322, as to opening statements of counsel.

4. Pen. Code, § 1094.

A variance in the usual order of proof is of no consequence, unless it clearly appears that the defendant has been prejudiced thereby.⁵ The matter being confided to the discretion of the court, an appellate court cannot review the action of the trial judge, except where it is apparent there has been an abuse of such discretion.⁶ To admit evidence without a proper foundation having been laid therefor is not error if the proof is afterwards produced, as this is a matter of order of proof merely and within the discretion of the court.⁷ Accordingly, it is not error to admit secondary evidence before the original is accounted for,⁸ or to admit evidence of a confession without showing that it was voluntarily made,⁹ or to admit evidence of acts of co-conspirators before proof is made of the conspiracy,¹⁰ or to submit exemplars of handwriting to an expert before their genuineness is established,¹¹ if proper proof is subsequently made. And it is not error to permit a witness to be withdrawn in order to lay a proper foundation for the admission of his testimony.¹²

Reading testimony.—When the testimony of a witness is given in so low a tone of voice as to be inaudible to the jury, it may be reread to them.¹³ And when documents

5. *People v. Monroe*, 138 Cal. 97, 70 Pac. 1072; *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Shainwald*, 51 Cal. 468; *People v. Goldworthy*, 130 Cal. 600, 62 Pac. 1074; *People v. Valencia*, 32 Cal. App. 632, 163 Pac. 865; *People v. Allen*, 32 Cal. App. 110, 162 Pac. 401; *People v. Maughs*, 8 Cal. App. 107, 119, 96 Pac. 407; *People v. Thompson*, 1 Cal. Unrep. 416 (where the relation between the defendant and the victim was proved before proof connecting him with the crime was introduced).

6. *People v. Gordan*, 103 Cal. 568, 37 Pac. 534.

7. *People v. Grill*, 151 Cal. 594, 91 Pac. 515; *People v. Goodwin*, 132 Cal. 368, 64 Pac. 561; *People v. Frank*, 28 Cal. 507, 519; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59.

8. *People v. Walton*, 35 Cal. App. Dec. 316, 199 Pac. 824.

9. See *supra*, § 205.

10. See *supra*, § 209.

11. *People v. Driggs*, 14 Cal. App. 507, 112 Pac. 577.

12. *People v. Prather*, 120 Cal. 660, 53 Pac. 259.

13. *People v. Harris*, 169 Cal. 53, 64, 145 Pac. 520 (holding, however,

are admissible in evidence, they may be read to the jury, without regard to the purpose for which they are offered.¹⁴

§ 302. Evidence in Chief.—As a part of its case in chief the prosecution may introduce any competent evidence which tends to rebut the presumption of innocence.¹⁵ It is not obliged to rest upon evidence which merely establishes the guilt of the defendant *prima facie*,¹⁶ but, on the contrary, should put in its whole case upon every point, and not reserve a part for rebuttal.¹⁷ While the people in their case in chief should not introduce evidence more properly in rebuttal, it is not reversible error to do so.¹⁸ The prosecution should not anticipate defenses,¹⁹ but it may introduce evidence of the whereabouts of the defendant at the time of the commission of the crime, though it has a tendency to anticipate a claim of alibi.²⁰ While ordinarily a defendant will have no cause for complaint if the prosecution prove his case also, this course may mislead the jury to his prejudice, as juries do not naturally look to the prosecution for proof of facts relied upon by the defendant.¹

Evidence of defendant.—At the conclusion of the people's case in chief, the defendant may offer evidence on

that a refusal of a request for such reading is not error where the jury were told that if they desired the testimony of the witnesses read the court would have it done, but where they expressed no desire to have the testimony reread). See *infra*, § 421, reading testimony at request of jury.

14. *People v. Northey*, 77 Cal. 618, 631, 19 Pac. 865, 20 Pac. 129.

15. *People v. Rulia Singh*, 182 Cal. 457, 479, 188 Pac. 987, 996.

16. *People v. Cook*, 148 Cal. 334, 83 Pac. 43.

17. See *infra*, § 305.

18. *People v. Grimes*, 132 Cal. 30, 64 Pac. 101; *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591; *People v. Van Horn*, 119 Cal. 323, 328, 51 Pac. 538; *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *People v. Bennett*, 65 Cal. 267, 3 Pac. 868; *People v. Maughs*, 8 Cal. App. 107, 119, 96 Pac. 407.

19. *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591.

20. *People v. Rulia Singh*, 182 Cal. 457, 188 Pac. 986, 996.

1. *People v. Taylor*, 36 Cal. 255, 264.

his case in chief. He may introduce any evidence which contradicts the statements of the witnesses for the prosecution or has a legal tendency to show that they are false,² and evidence tending to support his defenses or claims. But he may not open his case by cross-examining the witnesses of the prosecution because they know facts pertinent to the defense. He must wait until the prosecution rests and then make such witnesses his own.³

§ 303. Proof of Corpus Delicti and of Admissions and Confessions.—Logically, the first point to which the evidence of the people should be directed is the corpus delicti.⁴ This should be established before the introduction of evidence tending to connect the defendant with the offense.⁵ The rule, however, does not go so far as to exclude, in showing the corpus delicti, proof of the defendant's connection with the crime, where the circumstances of the case are such that proof of the crime involves proof of defendant's guilt.⁶

Admissions or confessions.—Proof of the corpus delicti should be made before the introduction of evidence of extrajudicial statements or admissions,⁷ and confessions.⁸

2. *People v. Williams*, 18 Cal. 187, 192.

3. *People v. Jones*, 1 Cal. Unrep. 544. See WITNESSES.

4. *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112. See *supra*, §§ 247, 248, as to definition and sufficiency of proof of corpus delicti.

5. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612; *People v. Jones*, 31 Cal. 565.

6. *People v. Tapia*, 131 Cal. 647, 652, 63 Pac. 1001; *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428.

7. *People v. Fallon*, 149 Cal. 287, 86 Pac. 689 (holding proof of corpus delicti in homicide case sufficient); *People v. Harris*, 114 Cal. 575, 46 Pac. 602 (holding corpus delicti in burglary case sufficiently established); *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People v. Kelly*, 28 Cal. App. 46, 151 Pac. 295; *People v. Barnovich*, 16 Cal. App. 427, 430, 117 Pac. 572; *People v. Carlson*, 8 Cal. App. 780, 97 Pac. 827; *People v. Grill*, 3 Cal. App. 514, 86 Pac. 613.

8. *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Tugwell*, 32

But in the absence of any showing of prejudice, irregularity in the order of proof is of no consequence, if the commission of the crime is ultimately established independently of the alleged admissions of the defendant.⁹

To authorize the reception and consideration by the jury of evidence of an extrajudicial confession or admission of a defendant, the people need not establish the corpus delicti by proof of the clear and convincing character required to support a conviction.¹⁰ It is sufficient if there is some proof,¹¹ or prima facie proof,¹² or even slight proof¹³ of the corpus delicti. The uncorroborated testimony of a witness is sufficient to establish the corpus delicti for this purpose,¹⁴ even when the statute requires

Cal. App. 520, 163 Pac. 508; *People v. Wing*, 31 Cal. App. 785, 161 Pac. 759; *People v. Vedal*, 28 Cal. App. 366, 152 Pac. 438 (proof in grand larceny case held sufficient).

9. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612 (admission); *People v. Besold*, 154 Cal. 363, 97 Pac. 871 (confession); *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99 (admission); *People v. Shainwald*, 51 Cal. 468, 51 Pac. 468; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59 (confession); *People v. Wagner*, 29 Cal. App. 363, 367, 155 Pac. 649 (confession); *People v. Barnovich*, 16 Cal. App. 427, 430, 117 Pac. 572 (admission); *People v. Sounders*, 13 Cal. App. 743, 747, 110 Pac. 825; *People v. Swaile*, 12 Cal. App. 192, 196, 107 Pac. 134; *People v. Maughs*, 8 Cal. App. 107, 119, 96 Pac. 407 (admission); *People v. Bianchino*, 5 Cal. App. 633, 91 Pac. 112.

10. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Alba*, 35

Cal. App. Dec. 160, 199 Pac. 894; *People v. Tugwell*, 32 Cal. App. 520, 526, 163 Pac. 508; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649; *People v. Spencer*, 16 Cal. App. 756, 117 Pac. 1039; *People v. Hatch*, 13 Cal. App. 521, 531, 109 Pac. 1097; *People v. Rowland*, 12 Cal. App. 6, 106 Pac. 428. See *People v. Cota*, 190 Pac. 473, "conceding that it devolved upon the people to show by independent evidence and beyond a reasonable doubt that the specific crime was committed, as a condition of admitting the confession in evidence," and citing to this. *People v. Smith*, 136 Cal. 207, 68 Pac. 702. But this last-named case does not make mention of such proof "beyond a reasonable doubt."

11. *People v. Alba*, 35 Cal. App. Dec. 160, 199 Pac. 894.

12. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

13. *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890.

14. *People v. Henson*, 32 Cal. App. 600, 163 Pac. 685.

corroboration before a conviction can be had.¹⁵ Indeed, the confession of the defendant will furnish sufficient corroboration.¹⁶ But proof by hearsay testimony is insufficient.¹⁷ Since the criminal agency of the defendant is not an element of the *corpus delicti*,¹⁸ it is not necessary that the evidence of the *corpus delicti* should itself connect or tend to connect the defendant with its perpetration in order to make evidence of the confession admissible.¹⁹

§ 304. Rebuttal.—In rebuttal, the people may introduce evidence contradicting the testimony of the witnesses for the defendant,²⁰ except when it relates to collateral and irrelevant matters elicited upon cross-examination.¹ The fact that the evidence is hearsay is immaterial, because the defendant who introduced it cannot complain that the people were allowed to contradict it.² After a view of the place of the crime, the prosecution in rebuttal may be permitted to explain any change in the condition of the premises as shown by the evidence and as seen by the jury.³

When a defendant introduces evidence of his insanity the prosecution in rebuttal may produce evidence of his

15. *People v. Richardson*, 161 Cal. 552, 563, 120 Pac. 20.

16. *People v. Richardson*, 161 Cal. 552, 563, 120 Pac. 20; *People v. Josselyn*, 39 Cal. 393, 400. See *supra*, § 256.

17. *People v. Frey*, 165 Cal. 140, 131 Pac. 127.

18. See *supra*, § 247.

19. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Flores*, 34 Cal. App. 393, 167 Pac. 413; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649. See ARSON, vol. 3, p. 172.

20. *People v. Figueroa*, 134 Cal. 159, 163, 66 Pac. 202 (holding that it is proper rebuttal for witnesses for the prosecution to contradict

statements of the defendant's witnesses contrary to their original testimony); *People v. Evans*, 5 Cal. Unrep. 125, 41 Pac. 444 (holding that the prosecution in rebuttal may contradict witnesses who testify to an alibi by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw the defendant at a place distant from the scene of the crime).

1. *People v. Tiley*, 84 Cal. 651, 24 Pac. 290; *People v. Dye*, 75 Cal. 108, 16 Pac. 537. See WITNESSES.

2. *People v. Duncan*, 8 Cal. App. 186, 96 Pac. 414.

3. *People v. Cramley*, 23 Cal. App. 340, 348, 138 Pac. 123.

sanity,⁴ and to this end may produce the testimony of intimate acquaintances,⁵ or it may show a motive for the crime, or that the acts of the defendant were not those of an insane person,⁶ or such other facts as tend to prove him sane.⁷ In rebuttal of partial insanity the prosecution may show that the defendant was in other respects sane.⁸ Although, strictly speaking, an alibi is not a defense,⁹ the prosecution in its evidence in chief is not bound to anticipate and forestall this claim, but is entitled to introduce evidence in rebuttal of it.¹⁰

§ 305. Evidence in Chief on Rebuttal.—While evidence strictly in rebuttal should consist of nothing which should have been offered in chief,¹¹ under section 1093 of the Penal Code, the matter of allowing the prosecution on rebuttal to introduce evidence which ought to have been given, as part of the people's case in chief rests in the discretion of the trial court. And its action is not ground for a reversal, where it is not shown that the defendant did not have an opportunity to produce all the evidence he could or desired to produce on all matters at issue, and where the discretion of the court does not appear to have been grossly abused.¹² If the defendant wishes to

4. *People v. Loomis*, 170 Cal. 347, 149 Pac. 581.

5. *People v. Hubert*, 119 Cal. 216, 51 Pac. 329.

6. *People v. Donlan*, 135 Cal. 489, 67 Pac. 761.

7. *People v. Zentgraf*, 33 Cal. App. Dec. 190, 193 Pac. 274 (holding that it may be shown the defendant pleaded guilty with the hope of being granted probation and withdraw it when probation was refused).

8. *People v. Hubert*, 119 Cal. 216, 221, 63 Am. St. Rep. 72, 51 Pac. 329.

9. See *supra*, § 34.

10. *People v. Ye Foo*, 4 Cal. App. 730, 89 Pac. 450.

11. See *supra*, § 304, as to duty of prosecution to put in its whole case on the examination in chief.

12. *People v. Willard*, 150 Cal. 543, 550, 89 Pac. 124; *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988; *People v. Dennis*, 39 Cal. 625, 635; *People v. Valencia*, 32 Cal. App. 631, 163 Pac. 865; *People v. Allen*, 32 Cal. App. 110, 162 Pac. 401; *People v. Cuin*, 27 Cal. App. 316, 149 Pac. 795; *People v. Rader*, 24 Cal. App. 477, 483, 141 Pac. 958; *People v. Whitlow*, 24 Cal. App. 1, 139 Pac. 826; *People v. Soto*, 11

contradict new matter brought out upon such testimony, the trial court may permit him to do so.¹³ So also the repetition of testimony given upon the people's case in chief, while not proper rebuttal,¹⁴ may be permitted in the discretion of the court,¹⁵ and can do no harm.¹⁶ Clearly, evidence proper in rebuttal is not rendered incompetent because it may indirectly tend to prove some other fact to be proved in chief.¹⁷

Although section 1093 of the Penal Code provides that the court may allow evidence in chief to be given in rebuttal "for good reason in furtherance of justice," the court may allow such proof without an affirmative showing of a reasonable excuse for omitting to present it before the prosecution rested its case in the first instance. "Good reason in furtherance of justice" exists when it becomes manifest to the court, even upon a mere suggestion of the proposition, that the proof to be offered is of a fact, failure to establish which might result in a miscarriage of justice.¹⁸

§ 306. Surrebuttal.—When the people offer any new matter in rebuttal, the defendant is entitled to offer evidence in surrebuttal,¹⁹ subject to the right of the court in its discretion to exclude matters, which, though technically proper in surrebuttal, have been completely covered

Cal. App. 431, 105 Pac. 420; *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951. See *infra*, § 307, as to reopening case for further testimony.

13. *People v. Valencia*, 32 Cal. App. 632, 163 Pac. 865. See *infra*, § 306.

14. *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

15. *People v. Clark*, 84 Cal. 573, 581, 24 Pac. 313.

16. *People v. Emerson*, 130 Cal. 562, 62 Pac. 1069.

17. *People v. Ye Foo*, 4 Cal. App. 730, 89 Pac. 450.

18. *People v. Wong Hing*, 28 Cal. App. 230, 151 Pac. 1159. Compare *People v. Soto*, 11 Cal. App. 431, 435, 105 Pac. 420, where it is said that the court should not permit evidence in chief to be given in rebuttal, except there be special reasons therefor.

19. *People v. Hill*, 116 Cal. 562, 48 Pac. 711; *People v. Valencia*, 32 Cal. App. 632, 163 Pac. 865.

in the examination in chief,²⁰ or which constitute but a repetition of previous testimony.¹ Evidence merely contradictory of defendant's testimony is not new matter within the rule.² When, for the purpose of weakening the effect of his testimony, the prosecution has shown that a witness had an interest in the result of the litigation, the defendant may show what the interest is.³ And when evidence of his declarations are given in rebuttal, the defendant may in surrebuttal give in evidence such additional parts of the conversation as are material.⁴

§ 307. Reopening Case for Further Testimony.—The matter of allowing a party to reopen his case for further evidence is one committed to the discretion of a trial court.⁵ And so, the court may in its discretion allow the prosecution to open its case for the purpose of introducing further testimony after the defendant has closed his case,⁶ or after a motion by the defendant to advise the jury to acquit, or after the prosecution has concluded his opening argument.⁷ To allow the prosecution to recall a witness after the close of its case cannot be prejudicial where the testimony brought out is a reiteration of the witness' previous testimony.⁸ When the district attorney has, inadvertently or through ignorance, omitted to put in certain material evidence, but has acted in good faith, and the court is satisfied that he so acted, it should be liberal

20. *People v. Griffith*, 146 Cal. 339, 347, 80 Pac. 68.

1. *People v. Mar Gin Suie*, 11 Cal. App. 42, 54, 103 Pac. 951.

2. *People v. Hill*, 116 Cal. 562, 48 Pac. 711.

3. *People v. Johnson*, 106 Cal. 289, 39 Pac. 622.

4. *People v. Hutchings*, 8 Cal. App. 550, 97 Pac. 325.

5. *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v.*

Christensen, 85 Cal. 568, 24 Pac. 888; *People v. Ross*, 65 Cal. 104, 3 Pac. 491; *People v. McPherson*, 6 Cal. App. 266, 91 Pac. 1098.

6. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470; *People v. McPherson*, 6 Cal. App. 266, 91 Pac. 1098. See *supra*, § 305.

7. *People v. Kennedy*, 32 Cal. App. Dec. 829, 192 Pac. 556.

8. *People v. Pasqueria*, 30 Cal. App. 625, 159 Pac. 173.

in allowing the case to be reopened, so that it may be fully tried upon all the facts. But when the district attorney deliberately keeps back a part of his testimony so as to surprise the defendant by bringing it out in cross-examination, at the same time speculating upon the contingency whether or not the defendant will take the stand, he does not stand in a very favorable position to ask to reopen his case, in the event the defendant does not testify.⁹

While a court should allow a defendant to reopen his case to introduce testimony that appears to be of substantial importance to him, it may refuse to do so if there is nothing to warrant the assumption that the testimony could assist him in the slightest degree.¹⁰ The court may deny a request to reopen a case for the purpose of introducing evidence in support of a plea of once in jeopardy.¹¹ It may refuse to permit the recall of a witness to explain parts of his testimony when he had been given ample opportunity to explain,¹² and it may refuse a request of the defendant to be permitted to testify in his own behalf made while the instructions are being given.¹³

Objection to and Striking Out Evidence.

§ 308. **In General.**—While a trial court on its own motion may exclude irrelevant or incompetent evidence,¹⁴ it is a well-settled rule that if a question propounded to a witness indicates upon its face that the response to it will be inadmissible, a party cannot take the chance of a favorable reply, and then if the answer be unfavorable

9. *People v. Emmons*, 13 Cal. App. 487, 497, 110 Pac. 151.

10. *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165.

11. *People v. Ross*, 65 Cal. 104, 3 Pac. 491.

12. *People v. Ryan*, 152 Cal. 364, 92 Pac. 853.

13. *People v. Christensen*, 85 Cal. 568, 24 Pac. 888.

14. *People v. Wallace*, 89 Cal. 158, 165, 26 Pac. 650; *People v. Goldenson*, 76 Cal. 328, 350, 19 Pac. 161; *People v. Turcott*, 65 Cal. 126, 3 Pac. 461 (cited in *Spotiswood v. Weir*, 80 Cal. 448, 22 Pac. 289).

object to the question or move to strike out the answer, if the latter be responsive.¹⁵ He must interpose an objection at a proper and seasonable time—that is to say, before the question is answered, if there is an opportunity to interpose it¹⁶—or he waives the right to have the answer stricken out. A motion to strike out evidence must be based upon an objection previously stated, if an opportunity therefor presented itself.¹⁷ This is a rule of practice to save the time of the court which would otherwise be uselessly consumed in listening to testimony and then striking it out. When the objection is not technical but substantial, and it appears that justice requires it, the court should allow a subsequent motion to strike, though no objection was made.¹⁸ But a large discretion is necessarily vested in the trial court, in such a case, and a plain abuse of discretion must be shown to justify a reversal.¹⁹

The rule under discussion presupposes that counsel has had an opportunity to interpose an objection. If a witness answers so quickly that an objection cannot be made, a motion to strike out is proper.²⁰ Similarly, if it is shown

15. *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554; *People v. Williams*, 127 Cal. 212, 59 Pac. 581; *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *People v. Nelson*, 85 Cal. 421, 426, 24 Pac. 1006; *People v. Samario*, 84 Cal. 484, 24 Pac. 283; *People v. Sheldon*, 68 Cal. 434, 438, 9 Pac. 457; *People v. Rolfe*, 61 Cal. 540; *People v. Long*, 43 Cal. 444; *People v. Glenn*, 10 Cal. 32; *People v. Ardell*, 6 Cal. Unrep. 827, 66 Pac. 970; *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968; *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808; *People v. Petruzo*, 13 Cal. App. 568, 110 Pac. 324;

People v. Long, 7 Cal. App. 27, 93 Pac. 387.

16. *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; *People v. Warner*, 25 Cal. App. 751, 145 Pac. 545; *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009.

17. *People v. Bradley*, 23 Cal. App. 44, 136 Pac. 955; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009.

18. *People v. Wallace*, 89 Cal. 158, 166, 26 Pac. 650.

19. *People v. Lawrie*, 4 Cal. App. 137, 87 Pac. 253.

20. *People v. Ho Kim You*, 24 Cal. App. 451, 460, 141 Pac. 950; *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303.

upon cross-examination of a witness that his testimony is hearsay, it may be stricken out on motion.¹

When a question is unobjectionable and the answer is incompetent or irrelevant, the answer may be stricken out without previous objection to the question;² for example, when the answer of the witness is not responsive to the question asked.³ In such a case, however, the motion should be made immediately upon receiving the answer or it comes too late.⁴

§ 309. Sufficiency of Objection and Motion to Strike Out.

While a trial court may sustain an objection which does not specify the particular grounds upon which it is based,⁵ it need not do so.⁶ Similarly, it may overrule an objection which specifies a wrong ground.⁷

A general objection is insufficient and may be overruled unless the question is objectionable from every standpoint, and upon its face there appears no purpose whatever for which the evidence asked could be admitted.⁸ Such an

1. *People v. Pico*, 62 Cal. 50.

2. *People v. Long*, 7 Cal. App. 27, 93 Pac. 387.

3. *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73; *People v. Card*, 40 Cal. App. 22, 180 Pac. 53.

4. *People v. Myring*, 144 Cal. 351, 77 Pac. 975.

5. *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

6. *People v. Hart*, 153 Cal. 261, 94 Pac. 1042; *People v. Clark*, 151 Cal. 200, 90 Pac. 549 (where an objection to a deposition of a witness at a preliminary examination upon the ground that the testimony was not taken down "by question and answer" was held to be waived); *People v. Nelson*, 85 Cal.

421, 428, 24 Pac. 1006; *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Bush*, 68 Cal. 623, 10 Pac. 169 (an objection to form of question as to defendant's reputation for truth, honesty and integrity is waived by a general objection); *People v. Chee Kee*, 61 Cal. 404; *People v. Manning*, 48 Cal. 335; *People v. Hart*, 38 Cal. App. 69, 175 Pac. 276; *People v. Pera*, 36 Cal. App. 292, 300, 171 Pac. 1091 (holding that an objection to a map should specifically point out wherein it is inaccurate); *People v. Watson*, 21 Cal. App. 692, 132 Pac. 836.

7. *People v. Joy*, 6 Cal. Unrep. 824, 66 Pac. 964.

8. *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Bojorquez*,

objection is insufficient to raise the objection that no proper foundation for the testimony has been laid.⁹ And even an objection that no proper foundation is laid is too general, if the particular defect or deficiency in the proof is not pointed out.¹⁰ An objection to immateriality is insufficient to raise the objection of incompetency.¹¹

Motion to strike out.—A motion to strike out evidence in order to prevail should be specifically directed against the objectionable part of the testimony. If too broad, it may be denied.¹² If the motion is directed to all the testimony of a witness,¹³ or to the whole answer to a question,¹⁴ it may be denied if any part is admissible. A party must specify his objection to the evidence in like manner as he is required to specify the grounds of his objections to a question,¹⁵ and base his motion upon the same ground as was specified in the objection previously made, if such an opportunity to object presented itself. Grounds of objection not specified are waived and cannot be urged upon the motion.¹⁶

55 Cal. 463 (holding a general objection is sufficient where the deposition of a witness at the preliminary examination is offered upon a showing that the witness was reachable by process). See *infra*, § 518.

9. *People v. Hart*, 153 Cal. 261, 94 Pac. 1042; *People v. Hart*, 38 Cal. App. 69, 175 Pac. 276. See *infra*, § 518.

10. *People v. Lamar*, 148 Cal. 564, 576, 83 Pac. 993.

11. *People v. Manning*, 48 Cal. 335.

12. *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; *People v. Ho Kim You*, 24 Cal. App. 451, 459, 141 Pac. 950; *People v. Pem-*

broke, 6 Cal. App. 588, 92 Pac. 668.

13. *People v. McFarlane*, 138 Cal. 481, 490, 71 Pac. 568, 72 Pac. 48 (by the court on rehearing); *People v. Rodley*, 131 Cal. 240, 253, 63 Pac. 351.

14. *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Knapp*, 16 Cal. App. 682, 117 Pac. 792; *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

15. *People v. Nelson*, 85 Cal. 421, 428, 24 Pac. 1006; *People v. Eckman*, 72 Cal. 582, 14 Pac. 359.

16. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006, explained in *Estate of De Laveaga*, 165 Cal. 607, 634, 133 Pac. 307; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009.

§ 310. Ruling upon Objection or Motion—Repetition of Objection.—Objections to evidence offered by a defendant should be overruled if the evidence is not plainly inadmissible, for by its exclusion a pretext for an appeal may be afforded.¹⁷ If proposed evidence is *prima facie* irrelevant or immaterial, the court is entitled to know specifically the purpose of counsel in asking the question. It is the duty of counsel to state his purpose clearly and completely, and his failure to do so is sufficient to justify the court in sustaining an objection thereto.¹⁸ Similarly, upon a motion to strike out irrelevant testimony, it is proper to accept the statement of counsel of his intention to connect it up as relevant, and to deny the motion temporarily with leave to renew it if not so connected up.¹⁹ But this practice is not to be commended with reference to prejudicial testimony offered by the prosecution, as the evidence although stricken out, inevitably leaves some impression upon the jurors.²⁰

Repetition of objection.—When the same evidence has been several times objected to and ruled out by the court, there is no need to repeat the objection on every repetition of the question. The objection may be treated as continuing unless something occurs to show that it is waived.¹

17. *People v. Southern*, 120 Cal. 645, 53 Pac. 214; *People v. Furtado*, 57 Cal. 345; *People v. Benson*, 52 Cal. 380; *People v. Devine*, 44 Cal. 452; *People v. Williams*, 18 Cal. 187, 195; *People v. Gee Gong*, 15 Cal. App. 28, 114 Pac. 78, 81.

18. *People v. Schell*, 123 Cal. 358, 55 Pac. 1006; *People v. Shaw*, 111 Cal. 171, 43 Pac. 593; *People v. Brown*, 15 Cal. App. 393, 114 Pac. 1004; *People v. Grider*, 13 Cal.

App. 703, 712, 110 Pac. 586; *People v. Brent*, 11 Cal. App. 674, 106 Pac. 110. See *infra*, § 519, as to exclusion of evidence and offer.

19. *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. McLean*, 84 Cal. 480, 24 Pac. 32.

20. *People v. Bird*, 132 Cal. 261, 64 Pac. 259.

1. *People v. Castro*, 125 Cal. 521, 58 Pac. 133; *People v. Melvane*, 39 Cal. 615. See *infra*, § 516.

View by Jury.

§ 311. In General.—The authority of a court to allow a view by the jury is expressly given by section 1119 of the Penal Code,² the language of which is as follows:

“When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.”

Whether to order a view is a matter committed solely to the discretion of the trial court,³ and it is said to be difficult to conceive of a case in which a refusal will be held to be an abuse.⁴ Indeed, the proceeding is hazardous, and frequently leads to difficulties, even when clearly within the terms of the code section. Consequently, it is well for the courts not to make use of the power given except in cases which seem imperatively to call for its exercise.⁵

§ 312. Nature and Object.—The view has been a part of the jury trial since its origin, and at one time constituted, with the personal knowledge of the jurors, the entire evi-

2. *People v. Bush*, 71 Cal. 602, 12 Pac. 781.

3. *People v. White*, 116 Cal. 17, 47 Pac. 771; *People v. Howard*, 28 Cal. App. 180, 151 Pac. 754; *People v. Sampo*, 17 Cal. App. 135, 151, 118 Pac. 957; *People v. White*, 5 Cal. App. 329, 340, 90 Pac. 471.

4. *People v. Wong Hing*, 176 Cal. 699, 169 Pac. 357; *People v. Lytle*, 34 Cal. App. 360, 167 Pac. 552;

People v. Maupins, 30 Cal. App. 392, 158 Pac. 502; *People v. Howard*, 28 Cal. App. 180, 151 Pac. 754.

5. *People v. Southern*, 120 Cal. 645, 53 Pac. 214; *People v. Fitzgerald*, 80 Cal. 538, 22 Pac. 216; *People v. Howard*, 28 Cal. App. 180, 151 Pac. 754; *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957; *People v. Smith*, 13 Cal. App. 627, 110 Pac. 333.

dence considered by them in arriving at their verdict. The whole matter of view is now limited by statute, and the courts in construing these statutes have reached widely divergent conclusions.⁶ Whatever may be the rule in other jurisdictions, the rule in California is that in viewing the premises, the jury is receiving evidence,⁷ and the knowledge gained is independent evidence to be taken into consideration in determining the issues of the case.⁸ If, for example, it be material to determine whether or not a hole in the panel of a door was caused by a bullet, and the panel was received in evidence, it would clearly be evidence in the case. It would be no less the reception of evidence if the jury should be conducted to the spot and the panel pointed out to them.⁹

§ 313. Presence of Judge and Defendant.—Since, under the rule in California, a jury is receiving evidence when viewing the premises, it follows that it is the sworn duty of the trial judge to be present at a view,¹⁰ unless his presence is waived by the defendant.¹¹ It is apparent, though, that this duty can never be omitted, even with the consent of the defendant, without the likelihood of substantial harm resulting to the accused.¹² The absence of the judge is not prejudicial, however, where the jury

6. *People v. White*, 5 Cal. App. 329, 339, 90 Pac. 471.

7. *People v. Milner*, 122 Cal. 171, 184, 54 Pac. 833 (holding that the rule stated in *Wright v. Carpenter*, 49 Cal. 607, a civil case, has been overruled); *People v. White*, 20 Cal. App. 156, 128 Pac. 417. But see *People v. Bonney*, 19 Cal. 426, 445, holding a view is a suspension of the trial, not a part thereof.

8. *Hatton v. Gregg*, 4 Cal. App. 537, 541, 88 Pac. 592, explaining *People v. Milner*, 122 Cal. 171, 54 Pac. 833.

9. *People v. Milner*, 122 Cal. 171, 184, 54 Pac. 833.

10. *People v. Yut Ling*, 74 Cal. 570, 16 Pac. 489; *People v. Akens*, 25 Cal. App. 373, 143 Pac. 795; *People v. White*, 20 Cal. App. 156, 128 Pac. 417; *People v. White*, 5 Cal. App. 329, 90 Pac. 471.

11. *People v. White*, 20 Cal. App. 156, 128 Pac. 417; *People v. White*, 5 Cal. App. 329, 90 Pac. 471.

12. *People v. White*, 20 Cal. App. 156, 160, 128 Pac. 417.

is instructed to disregard the view and another view is taken in the presence of the judge without objection.¹³

Presence of defendant.—A defendant in a criminal case has a right to be present at a view by the jury,¹⁴ and if he demands it, this right cannot be denied him without committing serious irregularity.¹⁵ This right, however, is one which he may waive.¹⁶ Such waiver may be by express stipulation,¹⁷ or where he is on bail, by voluntarily absenting himself,¹⁸ or by failing to ask permission to be present.¹⁹

§ 314. Miscellaneous Matters—*What may be viewed.*—Unlike section 610 of the Code of Civil Procedure, which specifically authorizes a view of the property which is the subject of litigation, section 1119 of the Penal Code limits the view to the “place” in which the offense was committed or in which any other material fact occurred. It seems, therefore, that in a criminal prosecution, a view of particular objects, such as animals, for example, is not authorized as against the objection of the defendant, if the court is not assembled at the place where the object is and if the object is not regularly introduced in evidence.²⁰

13. *People v. White*, 5 Cal. App. 329, 341, 90 Pac. 471.

14. *People v. Jones*, 11 Pac. 501; *People v. Lowrey*, 70 Cal. 193, 11 Pac. 605 (reversing upon this ground); *People v. Bush*, 68 Cal. 623, 10 Pac. 169 (the statute does not contemplate that a view shall be ordered or take place, unless in the presence of the defendant); *People v. Akens*, 25 Cal. App. 373, 143 Pac. 795; *People v. White*, 20 Cal. App. 156, 128 Pac. 417.

15. *People v. White*, 20 Cal. App. 156, 128 Pac. 417.

16. *People v. White*, 20 Cal. App. 156, 128 Pac. 417.

17. *People v. Searle*, 33 Cal. App. 228, 164 Pac. 819.

18. *People v. Mathews*, 139 Cal. 527, 73 Pac. 416.

19. *People v. White*, 20 Cal. App. 156, 128 Pac. 417. See *People v. Bonney*, 19 Cal. 426, 445, which holds that a view of a buggy was not a part of the trial, but a suspension of the trial, and the absence of the defendant was not ground for reversal where he made no objection and did not ask permission to accompany the jury.

20. *People v. Fagan*, 4 Cal. Unrep. 87, 33 Pac. 846 (holding that a view of animals, not alleged to

Such a view is not reversible error if the defendant fails to interpose proper objection,¹ or if he or his counsel consent thereto,² and the proceeding is in no respect extended beyond its legitimate scope by any act or word of the jurors, the judge or other officers.

Location of premises as affecting right to view.—A court in ordering a view is not limited by the code as to place, and it may exercise the right whether the place or places to be viewed lie in the county where the cause is then on trial, or in any other county of the state.³

Time of view.—The time when a view may be permitted is within the discretion of the trial court. While it is irregular to permit a view after the submission of a case to the jury, the court has a discretion to grant it upon the request of the defendant, made after a statement of a juror that they are unable to agree without it.⁴

Proceedings at view.—The person appointed to show the places named in the order for the view may point out and name such places to the jury.⁵ And when he in pointing out objects accompanies his statements by, "This is said to be," his statements are not of such a character as to

have been stolen, for the purpose of comparison is unauthorized); *People v. Fitzpatrick*, 80 Cal. 538, 22 Pac. 215 (not deciding whether a view of animals alleged to have been stolen was authorized, because the defendant failed to make a proper objection). But see *People v. Bonney*, 19 Cal. 426, 445 (holding that the trial court had discretion to permit the jury to view a buggy used by the defendant). And *People v. Sampo*, 17 Cal. App. 137, 118 Pac. 957 (holding that the ordering of a view is within the discretion of the trial court, the appellate court citing Code Civil Proc., § 610, instead of Pen. Code,

§ 1119, and applying the first-named section to a criminal case).

1. *People v. Fitzpatrick*, 80 Cal. 538, 22 Pac. 215.

2. *People v. Cahill*, 11 Cal. App. 685, 106 Pac. 115 (citing Code Civ. Proc., § 610, erroneously as Pen. Code, § 610).

3. *People v. Bush*, 71 Cal. 602, 12 Pac. 781.

4. *People v. Hawley*, 111 Cal. 78, 84, 43 Pac. 404.

5. *People v. Milner*, 122 Cal. 171, 185, 54 Pac. 833 (stating that *People v. Green*, 53 Cal. 60, was overruled by *People v. Bush*, 71 Cal. 602, 12 Pac. 781); *People v. Bush*, 71 Cal. 602, 12 Pac. 781.

be called evidence, other than that authorized by the code.⁶ Irregularities occurring at a view must be objected to when the opportunity is offered, or they will be held to be waived.⁷ If, for example, the evidence did not show a particular place or object was "said to be" such as described, the defendant must object at the first opportunity, or he is deemed to have waived the objection.⁸ The fact that the jury whisper among themselves while viewing the scene of the crime, does not of itself warrant a reversal.⁹

Conduct of Judge.

§ 315. **In General.**—The main duty of the trial judge is to see that the trial is orderly and legally conducted, to rule upon such questions of law as are presented to him, to declare such law as is applicable to the case, and to act impartially as between the people and the defendant.¹⁰ It is the undoubted right of a trial court, within the limits of a sound discretion, to control and regulate the conduct of a trial.¹¹ While counsel are officers of the court to assist the trial judge in conducting proceedings regularly and expeditiously, the responsibility of doing so rests ultimately with the trial judge and he is not required to await the action of counsel but may act upon his own motion.¹² He may, for example, confine a witness to the questions propounded him, although counsel make no objection.

6. *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554.

7. *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554; *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998. See *ARSON*, vol. 3, p. 176. And see note 4 A. L. R. 1266, as to occurrences during view as warranting jury's discharge without letting in plea of former jeopardy during subsequent trial.

8. *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554.

9. *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

10. *People v. Fong Ching*, 76 Cal. 169, 20 Pac. 396.

11. *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63.

12. *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506; *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868.

And the mere fact that in so doing he uses expressions which are not wholly in good taste does not render his action erroneous.¹³

It is the duty of a judge to preserve order in the court and see to it that all persons, including the defendant himself, indulge in no act or conduct calculated to obstruct the administration of justice.¹⁴ And a trial judge may rebuke witnesses for the use of profanity or other improper conduct.¹⁵ So also trial courts should take every precaution to prevent anything by which the jury may be overawed, or their minds influenced by an atmosphere surcharged with hostility or partiality. They should see that public sentiment is not expressed to or in the presence of the jury in such a way as to be likely to influence their verdict.¹⁶

§ 316. Remarks of Trial Judge.—Inasmuch as juries rely with great confidence on the integrity and fairness of judges, and upon the correctness of their views, a trial judge should be careful not to throw the weight of his judicial position into a case either for or against the defendant,¹⁷ unless satisfied that the evidence is insufficient to justify any conviction, in which case it is his duty so to advise the jury.¹⁸ The trial judge should refrain from any utterance which may be construed by the jury as an

13. *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506 (where the judge told the witness to "cut that out").

14. *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65.

15. *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058.

16. *People v. Fleming*, 166 Cal. 357, 377, Ann. Cas. 1915B, 881, 136 Pac. 291.

17. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. Hertz*, 105 Cal. 660,

39 Pac. 32; *People v. Choynski*, 95 Cal. 640, 30 Pac. 791; *People v. Gordon*, 88 Cal. 422, 26 Pac. 502; *People v. Williams*, 17 Cal. 142; *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825; *People v. Pitisci*, 29 Cal. App. 727, 736, 157 Pac. 502; *People v. Hunt*, 26 Cal. App. 514, 147 Pac. 476; *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703. See *infra*, § 347.

18. *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506. See *infra*, § 343.

intimation of his opinion on any issue of fact to be determined by them.¹⁹ He should not intimate that he believes in the defendant's guilt,²⁰ or make any remark indicating that he expects the jury to render a verdict of guilty.¹ He has no right, except when advising an acquittal, to comment upon, argue about, or express his opinion as to the weight or the truth or falsity of any evidence,² or to indicate that any witness had created a favorable impression on his mind.³ He should not even comment upon the propriety, in point of courtesy and good taste, of a witness' demeanor,⁴ or make comments in excuse of his manner of testifying.⁵ Nor is a trial judge justified in discrediting proper defenses or the effect of testimony proffered in their support.⁶ While the judge may put pertinent questions to witnesses,⁷ in doing so, he should avoid putting

19. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256.

20. *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852; *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703.

1. *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703; *People v. Taylor*, 4 Cal. App. 31, 87 Pac. 215 (holding, however, that it is not misconduct for the court, in response to a question of a juror as to the amount of punishment that can be inflicted, to tell the jury that they may make a recommendation to mercy of the court). See *infra*, § 423.

2. *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016; *People v. Smith*, 134 Cal. 448, 456, 66 Pac. 669; *People v. Willard*, 92 Cal. 482, 490, 28 Pac. 585; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484; *People v. Cramley*, 23 Cal. App. 340, 348, 138 Pac. 123;

People v. Overacker, 15 Cal. App. 620, 115 Pac. 756; *People v. Ruef*, 14 Cal. App. 576, 599, 114 Pac. 48, 54. See *People v. Elliott*, 80 Cal. 297, 22 Pac. 207, holding that it is improper, when counsel attempts to show a discrepancy between the testimony of a witness at the trial and at preliminary examination, for a court to say he could see no discrepancy.

3. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256.

4. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256.

5. *People v. Ruef*, 14 Cal. App. 576, 599, 114 Pac. 48, 54.

6. *People v. Lee Chuck*, 74 Cal. 30, 34, 15 Pac. 322; *People v. Pitisci*, 29 Cal. App. 727, 157 Pac. 502.

7. *People v. Szafesur*, 161 Cal. 636, 119 Pac. 1083; *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484; *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506; *People v. Saunders*, 13 Cal. App. 743, 110 Pac. 825.

the questions in such a manner as to give the jury the impression that he thinks the accused is guilty.⁸

In ruling upon an objection to the relevancy of offered evidence, it is not improper for the judge to mention the fact to which the evidence is relevant,⁹ or to state the reason for his ruling,¹⁰ especially where he states that it is for the jury to determine whether the fact stated is proved.¹¹ Such remarks, although made in the presence of the jury, are not addressed to them and will not be presumed to influence their actions.¹² So also in ruling upon an objection to argument as being without the scope of the evidence, it is not improper for the court to state that there was evidence to the point, where it does not express opinion to the effect of the evidence, or that any fact was proved.¹³ A statement of the court made upon an objection to evidence which adds nothing to the force or effect of his ruling is not an invasion of the province of the jury.¹⁴ And saying that the court wishes to avoid error is not prejudicial.¹⁵

§ 317. Conduct Toward Counsel.—While a trial judge should refrain from making any comments in disparagement of counsel,¹⁶ he may, when the circumstances call for it, rebuke counsel,¹⁷ and even punish them as for con-

8. *People v. Bowers*, 79 Cal. 415, 21 Pac. 752; *People v. Hunt*, 26 Cal. App. 514, 147 Pac. 476.

9. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

10. *People v. Gordan*, 103 Cal. 568, 37 Pac. 534.

11. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

12. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

13. *People v. Wong Hing*, 28 Cal. App. 230, 151 Pac. 1159.

14. *People v. Pera*, 36 Cal. App.

292, 171 Pac. 1091; *People v. Ah Wing*, 35 Cal. 218, 169 Pac. 402.

15. *People v. Keith*, 141 Cal. 686, 75 Pac. 304 (holding a remark, "I don't propose to have this case . . . reversed again if I can help it," amounts to a statement that the court desires to be correct in its rulings).

16. *People v. Ruef*, 14 Cal. App. 576, 599, 114 Pac. 48, 54. See *infra*, § 596.

17. *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Grider*, 13 Cal. App. 703, 713, 110 Pac.

tempt. Persistent misconduct on the part of special counsel for the prosecution may be punished as a contempt of court or by an order excluding the offender from further participation in the trial of the case.¹⁸ Whenever it appears to the court that the conduct or attitude of counsel toward a witness under examination is menacing and threatening, it is its duty upon its own motion to protect the witness.¹⁹ It is not improper for a judge to call the attention of counsel to the fact that his questions are an evasion of former rulings, even when no objection is made by opposing counsel.²⁰ And it is not misconduct for the court to instruct counsel, in the presence of the jury, as to the proper mode of interposing an objection,¹ or to require assertions addressed by counsel to witnesses to be put in the form of questions,² or to call the attention of counsel to the impropriety of reading law reports to the jury.³

IV. DUTIES AND CONDUCT OF COUNSEL.

Conduct of District Attorney.

§ 318. **In General.**—Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He owes to the defendant as solemn a duty of fairness as he is bound to give to the state,⁴ and he should not permit the great power with

586; *People v. Collins*, 5 Cal. App. 654, 91 Pac. 158.

18. *People v. Ho Kim You*, 24 Cal. App. 451, 465, 141 Pac. 950. See *CONTEMPT*, vol. vol. 5, p. 886.

19. *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63.

20. *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868.

1. *People v. Danford*, 14 Cal. App. 442, 451, 112 Pac. 474.

2. *People v. Eaton*, 6 Cal. Unrep. 906, 68 Pac. 583.

3. *People v. Anderson*, 1 Cal. Unrep. 697.

4. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78; *People v. Yokum*, 118 Cal. 437, 50 Pac. 686; *People v. Pang Sui Lin*, 15 Cal. App. 260, 114 Pac. 582; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318. See *supra*, § 74.

which he is clothed to be converted into an instrument of persecution.⁵ While some allowance must be made for the zeal which is the natural result of a prosecution, a district attorney should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust.⁶ He should be mindful of the rights of a defendant, and should not run counter to the plain provisions of the law governing criminal trials.⁷ On the other hand, he is attorney for the people, and he is not required to divulge to his adversary the private information he has concerning the evidence or the jurors.⁸

A district attorney should not during the progress of a trial make remarks in bad faith, and which are unjustly injurious to the defendant.⁹ He should not insinuate that the defendant, or any person acting in his behalf has suppressed testimony or disposed of physical objects so that

5. *People v. Hail*, 25 Cal. App. 342, 143 Pac. 803.

6. *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719; *People v. Pitisci*, 29 Cal. App. 727, 157 Pac. 502.

7. *People v. White*, 142 Cal. 292, 75 Pac. 828; *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719; *People v. Butler*, 8 Cal. 435; *People v. Pitisci*, 29 Cal. App. 727, 157 Pac. 502.

8. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54. See *supra*, § 298.

9. *People v. Searcey*, 121 Cal. 1, 41 L. R. A. 157, 53 Pac. 359 (opening statement held not to disclose, however, bad faith amounting to misconduct on the part of the district attorney); *People v. Ryan*, 108 Cal. 581, 41 Pac. 451 (but where the conduct of counsel was not of

such gravity and importance as to warrant a new trial); *People v. Devine*, 95 Cal. 227, 30 Pac. 378 (where the statements were held to have prejudiced the substantial rights of the defendant); *People v. Bowers*, 79 Cal. 415, 21 Pac. 752 (where reference by the prosecuting attorney to matters outside of the evidence and calculated to influence the jury were held prejudicial notwithstanding the court rebuked counsel and instructed the jury to pay no attention to such statements); *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719 (while the misconduct of the district attorney, persisted in against the protests of counsel for the defendant, might, it was said, be sufficient to warrant reversal, it was error nevertheless and the judgment was reversed).

they may not be available for use at the trial.¹⁰ It is misconduct for him to interrupt defendant's counsel when making his opening statement by stating that counsel knew very well he could not prove a certain matter.¹¹

§ 319. Conduct on Reception of Evidence.—A district attorney should not endeavor upon merely technical grounds to exclude competent and material evidence offered by the defendant,¹² nor should he seek to introduce evidence which is incompetent. While the mere offer of inadmissible evidence not made in bad faith is not misconduct,¹³ it is misconduct for a district attorney willfully and persistently to offer incompetent evidence to the prejudice of the defendant, well knowing its inadmissibility.¹⁴ But while it would not be proper for the district attorney to base an argument upon evidence that he has been excluded by the court, it has been held that he is authorized to base an argument upon evidence admitted by the court implying an admission of the facts charged.¹⁵

10. *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868 (where it was said that the remarks of counsel in all probability, involving charge and counter-charge between counsel, made no impression on the jury).

11. *People v. Benc*, 130 Cal. 159, 62 Pac. 404 (holding, however, the statement to be without prejudice).

12. *People v. Benson*, 52 Cal. 380. See *supra*, § 310.

13. *People v. Swearingen*, 168 Cal. 53, 141 Pac. 822; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *People v. Barbera*, 29 Cal. App. 604, 157 Pac. 532.

14. *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *People v. Wells*, 100

Cal. 459, 34 Pac. 1078 (judgment reversed because of misconduct); *People v. Pitisci*, 29 Cal. App. 727, 157 Pac. 502 (holding that when the court has read evidence offered by the district attorney and made an adverse ruling, it is misconduct for the district attorney to again offering it to state its contents and thereby indirectly get before the jury what he cannot put directly in evidence).

Of course, misconduct of the district attorney in reoffering evidence which has already been excluded will not afford ground for reversal of a judgment against the defendant where the ruling erred in his favor. *People v. Sainz*, 162 Cal. 242, 121 Pac. 922.

15. *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134.

It has been held that the district attorney has no right to make any insinuations as to improper matters that he could prove if he were not afraid of committing error.¹⁶ In making an offer of evidence, he is privileged, in good faith, to state what he expects to prove.¹⁷ But in doing this he should have due regard to the fact that his proffer is merely tentative, and that what is said ought not to be so stated as to give any color to the case in the minds of the jurors.¹⁸ It is not misconduct for a district attorney to call to the stand a person charged with the same offense as the defendant, although the witness claims his privilege and refuses to testify;¹⁹ nor is it misconduct for him to discredit defendant's witnesses;²⁰ or even to accuse them of perjury when he believes they testified falsely.¹ And when impeaching a witness by proof of prior inconsistent statements, a district attorney has a right to put before the witness the entire statement claimed by him, although it may impute to the witness the use of bad or profane language.²

§ 320. Asking Improper Questions.—A district attorney should not in bad faith ask improper questions of witnesses, even if no objection is made to them.³ The test for determining whether an improper question is misconduct is found in the answer to the question: "What is the purpose of counsel in asking the question?" If his pur-

16. *People v. Fleming*, 166 Cal. 357, Ann. Cas. 1915B, 881, 136 Pac. 291; *People v. Cowley*, 7 Cal. App. 501, 94 Pac. 866.

17. *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396.

18. *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586.

19. *People v. Plyler*, 121 Cal. 160, 53 Pac. 553. See WITNESSES, as to competency of such witnesses and privilege.

20. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

1. *People v. Metzger*, 143 Cal. 447, 77 Pac. 155.

2. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965.

3. *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *People v. Cokah-nour*, 120 Cal. 253, 52 Pac. 505 (questions relating to the domestic relations of the defendant are improper); *People v. Wells*, 100 Cal. 459, 34 Pac. 1078. See *infra*, § 604.

pose is to take an unfair advantage of the defendant by intimating to the jury something that is either not true or not capable of being proved in the manner attempted, he is guilty of misconduct.⁴ And so counsel is not permitted to ask improper questions when he knows that an objection thereto should or will be sustained,⁵ as, for example, where the court has already sustained objections to similar questions.⁶ It is also improper for the district attorney to ask a defendant questions which he knows to be wholly wrong, and which he asks without the expectation of answers,⁷ or for the sole purpose of prejudicing the jury against the defendant by the mere asking of the questions.⁸ It is ordinarily improper to cross-examine the defendant with reference to different aliases assumed by him.⁹ While a district attorney may in good faith cross-examine a witness to defendant's character with reference to his knowledge of specific acts inconsistent with the character testified to, it would be misconduct for him to ask such questions where it is apparent that his sole purpose is to get before the jury the intimation that the defendant has been guilty of specific acts of misconduct; in other words, where he has no information warranting a reasonable belief upon his part that the fact is

4. *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586.

5. *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101, opinion denying a rehearing, holding the question not prejudicial under the circumstances.

6. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *People v. Ryan*, 108 Cal. 581, 41 Pac. 451.

7. *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586.

8. *People v. Ryan*, 108 Cal. 581, 41 Pac. 451; *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229; *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586.

9. *People v. Fleming*, 166 Cal. 357, Ann. Cas. 1915B, 881, 136 Pac. 291; *People v. Mohr*, 157 Cal. 732, 109 Pac. 476; *People v. Pedone*, 35 Cal. App. 452, 170 Pac. 170. Contra: *People v. Meyer*, 75 Cal. 383, 17 Pac. 431 (per McFarland, J., dissenting). See *People v. Mallicoat*, 27 Cal. App. 355, 149 Pac. 1000, holding the conduct of defendant's counsel was a waiver of the objection.

as implied by the questions.¹⁰ It is not misconduct for the district attorney to ask a witness while out of court if certain matters are within his knowledge.¹¹ Whether a repetition of a proper question in different forms may constitute misconduct sufficient to call for a reversal is an open question.¹²

§ 321. Objection to and Assignment of Misconduct.—

When a district attorney is guilty of misconduct upon the trial of a criminal case, it is ordinarily the duty of counsel for the defense promptly to call the attention of the court thereto and assign it as misconduct or request the court to instruct the jury to disregard it.¹³ When this is done, and the action of the district attorney is improper, it is the duty of the court to reprimand the district attorney, and admonish the jury to disregard the statement of the district attorney, thus, if possible, destroying the prejudicial effect thereof.¹⁴ A claim that the evidence is being misquoted does not give opposing counsel the right to interrupt the argument by causing the evidence upon the controverted point to be read to the jury. If the court is itself of the opinion the evidence is being misrepresented it will, of its own motion or upon a suggestion to that effect, cause the proper corrections to be made. And an offer at the conclusion of the argument to allow the evidence to be read if the jury desire it gives the defendant every advantage he can ask.¹⁵

10. *People v. Perry*, 144 Cal. 748, 78 Pac. 284; *People v. Fodera*, 33 Cal. App. 8, 164 Pac. 22.

11. *People v. Perry*, 144 Cal. 748, 78 Pac. 284.

12. *People v. Bauweraerts*, 164 Cal. 696, 130 Pac. 717.

13. *People v. Panagoit*, 25 Cal.

App. 158, 143 Pac. 70; *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283. See *infra*, § 521.

14. *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441.

15. *People v. Faulke*, 96 Cal. 17, 30 Pac. 837.

Opening Statements.

§ 322. **In General.**—The purpose of an opening statement is merely to outline the testimony about to be offered, to the end that the jury may more clearly sift and digest it.¹⁶ It is entirely discretionary with either side whether to make an opening statement.¹⁷ And if the district attorney waives his right to make a statement, it is not reversible error to refuse the defendant's counsel the right to make a statement, if no prejudice results therefrom.¹⁸ The court may in its discretion limit the number of counsel making statements to one on each side.¹⁹

Effect of opening statements.—Opening statements of counsel are not evidence of any character or of anything, and cannot be so considered by the jury. As to the prosecution or defense the statement of either is not binding as an admission of any fact, nor available against either.²⁰ Nor is it a limitation upon the right of either party to introduce evidence of facts not referred to,¹ especially where the opposite party is not misled to his prejudice as to the scope of the evidence to be produced against him.²

§ 323. **Scope of Opening Statement.**—It is entirely within the discretion of counsel making an opening statement to determine the extent he shall go in stating the facts, whether generally or in detail.³ And a motion by

16. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

17. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Stoll*, 143 Cal. 689, 77 Pac. 818.

18. *People v. Greening*, 26 Cal. App. 49, 146 Pac. 51.

19. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

20. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818.

1. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818; *People v. Goodrum*, 31

Cal. App. 430, 160 Pac. 690 (per Hart, J., on denying rehearing); *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661.

2. *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661.

3. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818; *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604. See *People v. Clayberg*, 26 Cal. App. 614, 147 Pac. 994, holding the district attorney may state his intention of proving the circumstances at-

the defendant that the prosecution be required to make a fuller statement of what it expects to prove is properly denied.⁴ It is the duty of counsel making a statement to state the facts fairly,⁵ and to refrain from stating facts which he cannot or will not be permitted to prove.⁶ Yet, the mere violation of this rule by a prosecuting attorney is not of itself evidence that he acted in bad faith,⁷ and reversible error. Usually such an overstatement reacts upon the party making it.⁸ It is not the right or duty of an attorney to state the law to the jury in the opening address,⁹ and the court may refuse to allow him to do so.¹⁰ Yet a defendant cannot be prejudiced by the fact that the district attorney is allowed to argue the law, if the law is not misstated.¹¹

Concluding Arguments.

§ 324. In General.—The code provides that

“When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case

tending the commission of the crime.

4. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

5. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818. See *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863, holding that it is not improper for the prosecuting attorney in his opening statement to state that he would prove a voluntary confession of the defendant, where the confession is in fact voluntary.

6. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818; *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112.

7. *People v. Wong Hing*, 176 Cal. 699, 169 Pac. 357.

8. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592; *People v. Lewis*,

124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470; *People v. Donaldson*, 36 Cal. App. 63, 171 Pac. 442; *People v. Davis*, 26 Cal. App. 647, 147 Pac. 1184; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101. See *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161, holding that the court may prohibit defendant's counsel from criticising its action in fixing the time of trial.

9. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457.

10. *People v. Carty*, 77 Cal. 213, 19 Pac. 490; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643; *People v. Williams*, 43 Cal. 344.

11. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457.

to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close."¹²

The trial court may, in the exercise of its discretion, depart from the order of trial prescribed in this code section.¹³ The district attorney may waive an opening argument. But his doing so does not give the defendant the right to close and deprive the district attorney of his right to make a reply.¹⁴ There is no error in allowing private counsel employed to assist the district attorney to make the argument for the prosecution.¹⁵

"If the indictment or information be for an offense punishable with death, two counsel on each side may argue the case to the jury. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side."¹⁶

This provision gives the prosecution and defendant a right to have a capital case presented to the jury by at least two counsel. But the court in any criminal case may allow as many counsel as in its discretion should seem proper, to address the jury, whether upon the part of the people or the defendant. It is not error, therefore, to permit three counsel for the prosecution to address the jury, although the defendant has but two counsel.¹⁷

§ 325. Limitation of Argument.—While the constitutional right of a defendant to be heard in his defense includes the right of a complete discussion of all the matters

12. Pen. Code, § 1093, subd. 5; People v. Mortimer, 46 Cal. 114.

13. Pen. Code, § 1094; People v. Martin, 44 Cal. App. 45, 185 Pac. 1003.

14. People v. Martin, 44 Cal. App. 45, 185 Pac. 1003. See People v. Haun, 44 Cal. 96, and People v. Fair, 43 Cal. 137, decided under the Criminal Practice Act.

15. People v. Powell, 87 Cal. 348, 11 L. R. A. 75, 25 Pac. 481; People v. Murphy, 47 Cal. 103; People v. Strong, 46 Cal. 302.

16. Pen. Code, § 1095; People v. Jones, 123 Cal. 65, 55 Pac. 698.

17. People v. Ah Wee, 48 Cal. 236.

of law and evidence embraced by the case, it is a rule that a trial court has discretionary power to restrict counsel to a discussion of matters relevant to the case and restrain them from wasting the time of the court by useless repetitions.¹⁸ In other words, the court may limit the time for argument, provided it does not thereby deprive the defendant of the opportunity for a full defense.¹⁹ In view of the danger to which the exercise of this power is exposed, it has been suggested that in capital cases the court should limit the time for argument only in very extraordinary and peculiar instances.²⁰ In determining how much time shall be allowed for argument, a court should consider not only the length of the trial and the quantity of the testimony, but also the nature of the charge, the character of the testimony, and the issues raised by it.¹ It is not a safe guide for the judge to limit the time to a period in which he might think he could adequately and fully present the case for the defendant.²

18. *People v. Green*, 99 Cal. 564, 34 Pac. 231; *People v. Keenan*, 13 Cal. 581.

19. *People v. Mendosa*, 178 Cal. 509, 173 Pac. 998 (holding that a limit of fifteen minutes was proper where the number of witnesses was small and their testimony brief); *People v. Green*, 99 Cal. 564, 34 Pac. 231 (holding that a limit of one hour to a side was erroneous where the evidence was voluminous, partly circumstantial and extremely conflicting); *People v. Keenan*, 13 Cal. 581 (holding that a limit of one hour and a half was an abuse of discretion); *People v. Tock Chew*, 6 Cal. 636 (where the issues are not numerous or complicated, it is not error to allow the prosecution three-quarters of an hour and the defense half

an hour); *People v. Prewett*, 40 Cal. App. 416, 180 Pac. 844 (limit of one hour and a half held not improper); *People v. Morrell*, 28 Cal. App. 729, 153 Pac. 977 (holding that a limit of a half hour was not error); *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112 (holding a limit of one hour and three-quarters to be error). See note, 1 A. L. R. 1257, as to allowing counsel to exceed allotted time as reversible error.

20. *People v. Keenan*, 13 Cal. 581.

1. *People v. Green*, 99 Cal. 564, 34 Pac. 231 (per McFarland, J., concurring); *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112.

2. *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112.

§ 326. Scope of Argument Generally.—While an attorney in his address to the jury should confine himself strictly to the record,³ he has the right to state fully his views as to what the evidence shows and as to the conclusions to be fairly drawn therefrom,⁴ and the adverse party cannot complain if the reasoning be faulty and the deductions illogical, as these are matters ultimately for the jury.⁵ Counsel may comment upon facts brought out upon cross-examination as well as those brought out upon direct examination.⁶

The right of counsel to discuss the merits of the case both as to the law and facts is very wide.⁷ And so, he may argue every question of law, discuss the facts proved, arraign the conduct of parties, excuse or condemn motives as far as they are developed in the evidence;⁸ assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistencies or incoherence of their testimony, or by their manner of testifying, or their appearance on the stand or by circumstances.⁹

A prosecuting attorney may argue that the crime was committed in any manner the evidence shows reasonably

3. See *infra*, § 327.

4. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Couture*, 171 Cal. 43, 151 Pac. 659; *People v. Rogers*, 163 Cal. 476, 126 Pac. 143; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016; *People v. Romero*, 143 Cal. 458, 77 Pac. 163; *People v. Lesse*, 34 Cal. App. Dec. 1011, 199 Pac. 46; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396. See *People v. Barrios*, 35 Cal. App. Dec. 111, 199 Pac. 58, holding that the voluntary character of a confession is a proper subject for argument.

5. *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v.*

Graham, 32 Cal. App. Dec. 872, 192 Pac. 123; *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694; *People v. Cox*, 29 Cal. App. 419, 155 Pac. 1010; *People v. Kosta*, 14 Cal. App. 696, 112 Pac. 907.

6. *People v. Guaragna*, 23 Cal. App. 120, 137 Pac. 279.

7. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

8. *People v. Molina*, 126 Cal. 505, 59 Pac. 34; *People v. Yee Foo*, 4 Cal. App. 730, 89 Pac. 450.

9. *People v. Molina*, 126 Cal. 505, 59 Pac. 34; *People v. Miller*, 31 Cal. App. Dec. 206, 188 Pac. 52; *People v. Rossi*, 37 Cal. App. 778, 174 Pac. 916.

possible.¹⁰ He may denounce a theory of the defense;¹¹ speak of the things seen by a jury upon a view of the premises;¹² or articles exhibited to the jury;¹³ and he may refer to the instrument with which the crime was committed, although it was not formally introduced in evidence.¹⁴ It is not misconduct for the district attorney to refer to the fact that a witness is "colored," when there is some evidence to that effect and his appearance on the stand may indicate it.¹⁵

§ 327. Reference to Extraneous Matters.—Counsel in his address to the jury should remain strictly within the record and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs.¹⁶ Hence, as a general rule, it is error to permit counsel for the people against objection, to make statements of or comments upon facts pertinent to the issue and not in evidence, or to assume in argument that such facts are in the case when they are not.¹⁷ It is grave misconduct to state incriminating facts not in evidence in order to found an argument against the defendant;¹⁸ and it is especially reprehensible to refer to facts the evidence of which was excluded by the court,¹⁹

10. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

11. *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

12. *People v. Sue Chung Kee*, 26 Cal. App. 732, 148 Pac. 529.

13. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

14. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

15. *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

16. *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891; *People v. Hail*, 25 Cal. App. 342, 143 Pac. 803.

17. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v.*

Cook, 148 Cal. 334, 83 Pac. 43; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Molina*, 126 Cal. 505, 59 Pac. 34; *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *People v. Ah Len*, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; *People v. Mitchell*, 62 Cal. 411; *People v. Moore*, 32 Cal. App. Dec. 614, 191 Pac. 980; *People v. Bowman*, 24 Cal. App. 781, 142 Pac. 495 (where reference to the fact that the parties were brother Masons was made).

18. *People v. Cook*, 148 Cal. 334, 83 Pac. 43.

19. *People v. Fleming*, 166 Cal.

or to facts which the jury were told to disregard.²⁰ The prosecuting attorney should not in argument make statements as to his own knowledge of facts which were not proven.¹ Neither should he state or make comments carrying an implication that the defendant committed other crimes, where no reference thereto is made in the evidence.² And it is not error for the court to prevent defendant's counsel from commenting upon the actions of juries in other cases.³

The fact that the defendant's counsel refers to matters outside the record does not justify the district attorney in doing so. In such cases objections should be made to the statements of defendant's counsel when they are made, or a request should be made to the court that the jury be instructed to disregard them.⁴ But it is not a violation of this rule to make statements in rebuttal of inferences drawn by the defendant's attorney from a failure to introduce certain articles in evidence.⁵

§ 328. Comment upon Defendant.—When the defendant does not submit himself as a witness in the case, it is improper to comment upon or call the attention of the jury

357, Ann. Cas. 1915B, 881, 136 Pac. 291; *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090; *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442; *People v. Webster*, 36 Cal. App. 540, 172 Pac. 768; *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134. See *People v. Romero*, 143 Cal. 458, 77 Pac. 163, holding it improper to comment upon the motive of the defense in having evidence excluded.

20. *People v. Parrish*, 25 Cal. App. 314, 143 Pac. 546.

1. *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Valliere*, 127 Cal. 65, 59 Pac. 295; *People v. Razo*, 43 Cal. App. 251, 184 Pac.

881; *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891.

2. *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *People v. Sing Lee*, 145 Cal. 190, 78 Pac. 636; *People v. Valliere*, 127 Cal. 65, 59 Pac. 295; *People v. Clayberg*, 26 Cal. App. 614, 147 Pac. 994; *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318.

3. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

4. *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. Mitchell*, 62 Cal. 411.

5. *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

to his personal appearance or his demeanor while at the bar, as a factor in evidence.⁶ And intimations as to the character or reputation of the defendant are improper, when the defendant did not put his character in issue.⁷ But it does not necessarily follow that such misconduct merits a reversal, unless it is so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court can destroy its influence.⁸

Where the defendant takes the stand, the district attorney may comment upon his demeanor while testifying.⁹ He may express his doubts as to the truth of the defendant's testimony,¹⁰ and it has been held that it may be within the lines of legitimate argument to assert that the defendant had added perjury to his other crimes when such conclusion is a fair inference from the testimony properly before the court.¹¹ If it appears from the cross-

6. *People v. Frigerio*, 107 Cal. 151, 40 Pac. 107 (but holding that in order to avail himself of the objection, it was the duty of the defendant to direct the court's attention specifically to such transgression of the people's privilege); *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51 (but where the defendant fails to act upon such misconduct, it cannot be considered as prejudicial).

7. *People v. Smith*, 134 Cal. 453, 66 Pac. 669, holding it improper to express a wish that the defendant had thrown down the bars so that the prosecution might have proved his character, but where the court rebuked the counsel and instructed the jury not to consider the defendant's character, the misconduct was not so serious as to warrant a reversal.

8. *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Nakis*, 184 Cal. 105, 193 Pac. 92;

People v. Wong Hing, 176 Cal. 699, 169 Pac. 357; *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599; *People v. Babcock*, 160 Cal. 537, 117 Pac. 549; *People v. Shears*, 133 Cal. 154, 65 Pac. 295. See *supra*, § 321.

9. *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396.

10. *People v. Lopez*, 21 Cal. App. 188, 131 Pac. 104.

On the ground that it referred exclusively to the admissibility of a confession, it has been held improper for the district attorney to state to the court in the hearing of the jury that the jury were not entitled to consider the evidence of the defendant, but where the judge instructed the jury to disregard what was said between court and counsel, the misconduct was held to be without prejudice. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

11. *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295.

examination of the defendant that he has been convicted of a felony, the district attorney may refer thereto,¹² though it is improper for him to go into the details of the case.¹³ While a prosecuting attorney has no right to use degrading epithets in reference to the defendant,¹⁴ it does not, however, follow that the latter is entitled as of right to be spoken of under the fire of incriminating evidence as if he were an innocent man.¹⁵ And so, under the circumstances of proof, it has been held not prejudicial error to refer to the defendant as a "dirty old scoundrel,"¹⁶ or to a "foul fiend from hell,"¹⁷ or a "wicked man possessed of a depraved heart,"¹⁸ or a "debaucher,"¹⁹ or "a moral leper,"²⁰ especially where the court advises the jury to disregard such characterizations.¹ Nor is it misconduct to compare a defendant's courage with that of a hyena,² or to state that the defendant ought to be in the penitentiary.³ But since a defendant is upon trial for what he has done and not for what he might have done, it is not the privilege of the prosecutor to speculate with reference to his possible conduct under given circumstances.⁴

12. See *infra*, § 617.

13. *People v. Wing*, 23 Cal. App. 53, 137 Pac. 48 (but the court was unable to say that the observations of the district attorney prejudicially affected the defendant's case).

14. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Jones*, 12 Cal. App. 129, 106 Pac. 724.

15. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965; *People v. Rossi*, 37 Cal. App. 778, 174 Pac. 916; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396.

16. *People v. Bose*, 28 Cal. App. 743, 153 Pac. 965.

17. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965.

18. *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599.

19. *People v. Rossi*, 37 Cal. App. 778, 174 Pac. 916.

20. *People v. Vickroy*, 41 Cal. App. 275, 182 Pac. 764.

1. *People v. Bose*, 28 Cal. App. 743, 153 Pac. 965.

2. *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396.

3. *People v. McMahon*, 124 Cal. 435, 57 Pac. 224.

4. *People v. Couture*, 171 Cal. 43, 151 Pac. 659. See *People v. Frost*, 37 Cal. App. 120, 174 Pac. 106, holding the inference that the defendant might commit another crime was not unjustifiable or ground for reversal.

§ 329. Opinions as to Defendant's Guilt.—Counsel for the prosecution has no right to indulge in extravagant expressions of his belief in the defendant's guilt.⁵ But he has the right to state his views, his beliefs and his convictions as to what the evidence establishes,⁶ and to urge that the evidence convinces his mind or is conclusive of the guilt of the defendant.⁷ It is improper, though, for him to assert his personal belief or personal conviction as to the guilt of the accused, if that belief or conviction is predicated upon anything other than the evidence in the case.⁸ It is also improper to refer to the belief in the defendant's guilt entertained by the grand jurors and others, for obviously such belief might be based upon matters not before the jury in the form of legal evidence.⁹

§ 330. Comment upon Defendant's Failure to Testify.—Section 1323 of the Penal Code provides that the neglect or refusal of the defendant "to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding." Under this provision it is improper for the district attorney to draw adverse inferences from the failure of the defendant to testify, or in any way to use that fact against him.¹⁰ And this was held to be

5. *People v. Ward*, 134 Cal. 301, 66 Pac. 372 (holding, however, that where the court instructed the jury not to consider the statements or views of the district attorney in this respect, the defendant was not prejudiced by them); *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891.

6. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

7. *People v. Rogers*, 163 Cal. 476, 126 Pac. 143; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Romero*, 143 Cal. 458, 77 Pac. 163; *People v. Bracklis*, 35 Cal. App. Dec. 901, 200 Pac. 1062; *People v.*

Edgar, 34 Cal. App. 459, 167 Pac. 891; *People v. Bowman*, 24 Cal. App. 781, 142 Pac. 495; *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

8. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891 (where among many statements as to his belief in defendant's guilt, the district attorney stated he would not prosecute any man whom he did not believe to be guilty).

9. *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891.

10. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Teshara*, 134

the general rule prior to the adoption of the code, when there was no express statute forbidding adverse comment, it being held that such comment was in violation of the spirit of the constitutional provision declaring that a defendant should not be compelled to be a witness against himself.¹¹ While it has been said that it is even improper to allude in any way to the fact that the defendant has refrained from testifying,¹² this statement has been criticised as being an unauthorized enlargement of the language of the statute which only prohibits the use of defendant's silence against him.¹³ Likewise, the silence of the defendant at the coroner's inquest is not a proper subject for comment and inference against the defendant by counsel or court.¹⁴ It is not improper, however, for a district attorney to state that certain evidence of the prosecution is uncontradicted,¹⁵ or to point out that incriminating circumstances have not been explained by any sworn testimony.¹⁶ Such statements are not ordinarily indicative of any purpose on the prosecutor's part to use against the defendant the fact that he did not take the stand in his behalf, unless the comment is addressed to the defend-

Cal. 542, 66 Pac. 798; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Morino*, 53 Cal. 67; *People v. Wademan*, 38 Cal. App. 116, 175 Pac. 791; *People v. Waugh*, 30 Cal. App. 402, 158 Pac. 336; *People v. Kelly*, 28 Cal. App. 46, 151 Pac. 295; *People v. Keko*, 27 Cal. App. 351, 149 Pac. 1003; *People v. Higgins*, 9 Cal. App. 267, 98 Pac. 683; *People v. Fitts*, 4 Cal. App. 432, 91 Pac. 536.

11. *People v. Tyler*, 36 Cal. 522.

12. *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463 (citing to this point, *People v. Tyler*, 36 Cal. 522, *People v. McGungill*, 41 Cal. 429, and

People v. Sanders, 114 Cal. 216, 46 Pac. 153).

13. *People v. Fitts*, 4 Cal. App. 432, 91 Pac. 536 (where the district attorney said that he was not permitted to comment upon the defendant's failure to take the stand and would say nothing about that).

14. *People v. Lemperle*, 94 Cal. 45, 29 Pac. 709.

15. *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599; *People v. Wademan*, 38 Cal. App. 116, 175 Pac. 791; *People v. McLeod*, 30 Cal. App. 435, 158 Pac. 506.

16. *People v. Miller*, 31 Cal. App. Dec. 206, 188 Pac. 52; *People v. Waugh*, 30 Cal. App. 402, 158 Pac. 336.

ant himself.¹⁷ Under the general rule stated, the defendant's failure to testify as to any particular point should not be commented on in argument.¹⁸ Where the defendant offers himself as a witness the district attorney may legitimately call the attention of the jury to the fact that his testimony upon a subject is vague and contains no explicit denial,¹⁹ or that he failed to deny certain statements attributed to him.²⁰

§ 331. Comment upon Failure of Others to Testify.—

While the code contains no provision prohibiting any comment upon the failure of the wife of a defendant to testify, the reason underlying the provisions of section 1323 of the Penal Code applies with much force, as the wife is made incompetent to testify for or against her husband in a criminal action, except by the consent of both.¹ It is not error, however, for the district attorney to refer to the failure of a codefendant to testify for the defendant.² But counsel should not go further and state that the presumption of law is that his testimony would have been adverse to the defendant or refer to the fact, if it be the fact, that he had been subpoenaed by the defense and not put on the stand.³

§ 332. Arguing Law and Reading Books.—Counsel in argument may read books which deal with matters of

17. *People v. Keko*, 27 Cal. App. 351, 149 Pac. 1003; *People v. Kizer*, 22 Cal. App. 10, 133 Pac. 516, 521, 134 Pac. 346.

18. *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *People v. McGungill*, 41 Cal. 429; *People v. DeVries*, 35 Cal. App. Dec. 263, 199 Pac. 867; *People v. Mirandi*, 38 Cal. App. 178, 175 Pac. 653. See *People v. Mead*, 145 Cal. 500, 78 Pac. 1047.

19. *People v. Mead*, 145 Cal. 500, 78 Pac. 1047.

20. *People v. Wong Bin*, 139 Cal. 60, 72 Pac. 505; *People v. Bracklis*, 35 Cal. App. Dec. 901, 200 Pac. 1062.

1. *People v. Terramorose*, 30 Cal. App. 267, 157 Pac. 1134; *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543.

2. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *People v. Ye Foo*, 4 Cal. App. 73, 89 Pac. 450.

3. *People v. Smith*, 121 Cal. 355, 53 Pac. 802. See *supra*, § 327,

general or current history, as this is only to refresh the memory of the court and jury as to something they are supposed to know.⁴ But he should not be permitted to read from medical treatises, as these are mere statements of hearsay facts.⁵ While it is the settled rule in California that it is the duty of the jury to take the law from the court,⁶ it is also a rule that it is within the discretion of the court to limit counsel in his argument to a discussion of the facts or to allow him to argue the law and read law books to the jury.⁷ While the reading of law books and opinions of appellate courts to the jury in argument is objectionable⁸ and may be disallowed,⁹ it is not reversible error for a trial court to permit it to be done.¹⁰ So also it is discretionary with the court to permit counsel to use the instructions before the jury.¹¹ When arguing the law, counsel should not state the law incorrectly, or endeavor to induce the jury to disregard the instructions of the court or take the law of the case from the books read rather than from the court.¹² It is improper for a district attorney to place upon the defendant a greater

reference to matters not in evidence.

4. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *People v. Lesse*, 34 Cal. App. Dec. 1011, 199 Pac. 46, where, upon a prosecution for syndicalism, the district attorney read a book expounding the doctrines of the "I. W. W."

5. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *People v. Gordon*, 1 Cal. Unrep. 459. See *supra*, § 245, admissibility of medical treatises in evidence.

6. See *supra*, § 361.

7. *People v. Treadwell*, 69 Cal. 226, 10 Pac. 502; *People v. Anderson*, 44 Cal. 65; *People v. Denomme*, 6 Cal. Unrep. 227, 56 Pac. 98. See *supra*, § 323, arguing law in opening statement.

8. *People v. Anderson*, 44 Cal. 65; *People v. Anderson*, 1 Cal. Unrep. 697.

9. *People v. Godwin*, 123 Cal. 374, 55 Pac. 1059; *People v. Haney*, 31 Cal. App. Dec. 581, 189 Pac. 338 (holding that defendant's counsel may be denied permission to read excerpts from the reports as to the third degree methods of obtaining confessions).

10. *People v. Treadwell*, 69 Cal. 226, 10 Pac. 502; *People v. Forsythe*, 65 Cal. 101, 3 Pac. 402; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

11. *People v. Denomme*, 6 Cal. Unrep. 227, 56 Pac. 98.

12. *People v. Anderson*, 44 Cal. 65.

burden of proof than the law demands, as, for example, when he in effect tells the jury it is incumbent upon the defendant to prove who the guilty party is.¹³

§ 333. Illustrations.—Counsel may illuminate his argument by illustrations which may be as various as the resources of his talents.¹⁴ He may refer in his argument to matters of common knowledge, not special to the case,¹⁵ and to well-known historical incidents.¹⁶ He may use the exhibits in the case, and place them in any order or sequence he chooses, to point out similarities or dissimilarities, or for any other legitimate purpose connected with his argument.¹⁷ It has been held that the use of objects not introduced in evidence for purposes of illustrating argument is not prejudicial, where the jury are informed that the object is not an exhibit in the case, and that they are not bound to accept the statements of the district attorney as evidence.¹⁸

§ 334. Appeal to Jury.—A district attorney may allude to the duty of the jury to convict the defendant, or refer in argument, to the prevalence of crime,¹⁹ or to the fact that many persons claim that the jury system is a failure,²⁰ but it is a violation of duty for him to avow a belief in the efficacy of mob law.¹ While it is reprehensible for the district attorney to comment on the frequency of crime in the county and the failure to punish it,² such

13. *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891.

14. *People v. Molina*, 126 Cal. 505, 59 Pac. 34.

15. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Molina*, 126 Cal. 505, 59 Pac. 34; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

16. *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

17. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

18. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

19. *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

20. *People v. Molina*, 126 Cal. 505, 59 Pac. 34.

1. *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

2. *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

comments are not ordinarily deemed to be prejudicial error.³ A district attorney should not make statements involving a threat to the jury as to what will take place if they do not convict.⁴ Nor should he in effect declare to them that if they do not convict they will lose the respect and confidence of their neighbors. Such remarks inject into the case the question of the honesty and integrity of the jurors themselves.⁵ It has been said that an argument as to the consequences upon the future of the victim of the crime is not ground for reversal, where, if the jury believed the testimony, they were bound to convict, regardless of the consequences.⁶ It is not misconduct for the district attorney to comment on the instructions, as, for example, to state that the instructions are prepared by counsel and that they stated hypothetical circumstances and conditions which made it necessary for the jury to examine them critically and carefully.⁷

§ 335. Miscellaneous Matters.—Recriminations between the district attorney and counsel for the defendant, respecting their official and professional methods, although ill-timed, are not ground for reversal where no prejudice to the defendant appears to have resulted therefrom.⁸ While a district attorney should not refer to the participation by the defendant's counsel in the prosecution of another case,⁹ or suggest that defendant's counsel had manufactured a spurious case for the defense, unless there is clear evidence properly brought into the record to justify it,¹⁰ or argue upon the character and extent of pun-

3. *People v. Molina*, 126 Cal. 505, 59 Pac. 34; *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

4. *People v. Peck*, 43 Cal. App. 638, 185 Pac. 881; *People v. Warr*, 22 Cal. App. 663, 136 Pac. 304.

5. *People v. Hail*, 25 Cal. App. 342, 143 Pac. 803.

6. *People v. Williams*, 35 Cal. App. Dec. 115, 199 Pac. 56.

7. *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384.

8. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51.

9. *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506.

10. *People v. Charlie*, 34 Cal. App. 411, 167 Pac. 703.

ishment which under the law, the court might inflict,¹¹ or refer to the right, or want thereof, in either party to appeal, or the extent of review granted by law to either party upon appeal,¹² or say that in the event of conviction, he will consent that the case be referred to the probation officer, such consent not being required,¹³ or state his impressions on hearing of the crime,¹⁴ or refer to the presence of the relatives of the defendant at the trial,¹⁵ such references or statements are not ordinarily deemed to be prejudicial misconduct.¹⁶ It is not misconduct, however, for the district attorney to challenge opposing counsel and explain the facts proved, and give his version of the offense.¹⁷ It has been held that when a case is not one of circumstantial evidence, the court may refuse to allow defendant's counsel to argue it upon that theory.¹⁸

V. PROVINCE OF COURT AND JURY.

Introductory.

§ 336. General Rule.—The respective functions of the court and jury are declared in the Penal Code as follows:

“The court must decide all questions of law which arise in the course of a trial.”¹⁹

11. *People v. Dye*, 29 Cal. App. 169, 154 Pac. 875; *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295.

12. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152.

13. *People v. Peeples*, 32 Cal. App. 279, 162 Pac. 653.

14. *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

15. *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

16. See cases cited *supra*.

17. *People v. Hall*, 94 Cal. 565, 30 Pac. 7. See *People v. Bray*, 42 Cal. App. 465, 183 Pac. 712, where it was held that if it appears that the victim of the crime with whom the defendant lived was not his wife, but the wife of another man, the district attorney may refer to her by her proper name, although it may tend to prejudice the defendant.

18. *People v. Lapara*, 181 Cal. 66, 183 Pac. 545.

19. Pen. Code, § 1124.

"On a trial for libel, the jury has the right to determine the law and the fact."²⁰

"On a trial for any other offense than libel, questions of law are to be decided by the court, questions of fact by the jury; and, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court."²¹

As summed up in one case, the jury are the exclusive judges of the credibility of witnesses, the weight of testimony, and of the facts established, and the presumption of facts deducible from them.²²

Since it is the duty of the court to decide questions of law, it is error to submit them to the determination of the jury. For example, it is error for a court to submit to the jury the question of the relevancy of evidence and direct them to consider it if they think it applicable to the issue and disregard it if of a contrary opinion.²³ A court cannot divest itself of its duty to determine questions of law, however complicated or numerous the facts. And so it has been held that the court cannot put an instruction to the jury where its effect is to leave to them in another form the function of determining whether there was probable cause in a case involving a malicious prosecution. In such a case the court should group in instructions the facts which the evidence tends to prove, and then instruct that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.²⁴

²⁰ Pen. Code, § 1125. See LIBEL AND SLANDER.

¹ Pen. Code, § 1126; *People v. Lem You*, 97 Cal. 224, 32 Pac. 11. See *People v. Williams*, 24 Cal. 31, and *People v. English*, 30 Cal. 214, as to same general rule prior to the adoption of the code.

² *People v. Messersmith*, 61 Cal. 246.

³ *People v. Ivey*, 49 Cal. 56.

⁴ *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937. See *People v. Lem You*, 97 Cal. 224, 32 Pac. 11, followed in *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, and holding the rule given in the text is a correct statement of the duty of the court on a trial for perjury if the words "material-

§ 337. **Particular Questions.**—The sufficiency of an indictment or information is a question to be determined by the court, not by the jury.⁵ But it is a question of fact for the jury whether the defendant was the perpetrator of the crime charged,⁶ whether he was instigated to commit the crime charged against him by officers of the law,⁷ whether he fled from the scene of the crime,⁸ whether a conspiracy to commit the crime existed,⁹ and, if so, who were the parties thereto,¹⁰ what is the age of a person whose age is involved,¹¹ whether an interpreter's translation of testimony was accurate,¹² and, generally, all such questions as are spoken of as questions of fact in this and the succeeding sections.¹³ When exemplars of handwriting are submitted for comparison, the issue is one of fact for the jury. And the judge cannot, by refusing to allow the writings to be submitted to the jury, deprive the defendant of the right to have the jury determine the question of fact.¹⁴ Where there is a variance between the name of the defendant or other person as alleged and proved, the question of identity is one of fact for the jury.¹⁵ If there is a conflict of evidence as to the law of a sister state on a particular subject, the question is one

of testimony" be substituted for "probable cause."

5. *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384. See **INDICTMENT AND INFORMATION**.

6. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

7. *Peterson v. United States*, 255 Fed. 433, 166 C. C. A. 509.

8. *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379; *People v. Gee Gong*, 15 Cal. App. 23, 114 Pac. 78, 81.

9. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

10. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

11. *People v. Babcock*, 160 Cal.

537, 117 Pac. 549; *People v. Webster*, 111 Cal. 381, 43 Pac. 1114.

12. *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283.

13. See *infra*, this section; and see *infra*, § 338 et seq.

14. *People v. Storke*, 128 Cal. 486, 60 Pac. 1090 (holding that when in a libel suit the defendant produced exemplars of handwriting to prove that the libelous letter was written by another, it was error to strike out the exemplars upon the testimony of an expert for the prosecution that there was no similarity between them).

15. *People v. Ah Sun*, 160 Cal. 788, 118 Pac. 240; *People v. Fick*, 89 Cal. 144, 26 Pac. 759.

of fact for the jury.¹⁶ It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination.¹⁷ And any designation of degree in the indictment or information may be disregarded by them.¹⁸

Jeopardy.—In general, a plea of once in jeopardy presents a question of fact which a jury has the right to solve;¹⁹ yet, where the evidence is uncontradicted, the question becomes one of law upon which the court is authorized to advise the jury directly.²⁰

Who are accomplices.—Whether a witness is an accomplice of the defendant is usually a question of fact for the jury, under proper instructions.¹ It is a question for the jury whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things which, admittedly, if he did,

16. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78.

17. *People v. Rico*, 180 Cal. 385, 181 Pac. 663; *People v. Machuca*, 158 Cal. 62, 109 Pac. 886; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Worthington*, 122 Cal. 583, 55 Pac. 396; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Martinez*, 66 Cal. 278, 5 Pac. 261; *People v. Russell*, 81 Cal. 616, 23 Pac. 418; *People v. Nichol*, 34 Cal. 211; *People v. Turpin*, 10 Cal. App. 526, 102 Pac. 680; *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384.

18. *People v. Michal*, 34 Cal. 211; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.

19. *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013; *People v. Wilkison*, 30 Cal. App. 473, 158 Pac. 1067.

20. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Wil-*

kison, 30 Cal. App. 473, 158 Pac. 1067. See *infra*, § 343.

1. *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901 (quoted in *State v. Grant*, 26 Idaho, 189, 140 Pac. 959); *People v. Stratton*, 141 Cal. 604, 75 Pac. 166; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082; *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *People v. Curlee*, 53 Cal. 604; *People v. Fuski*, 32 Cal. App. Dec. 1038, 192 Pac. 552; *People v. Kanniessser*, 44 Cal. App. 345, 186 Pac. 388; *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874; *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. See *infra*, § 340, as to credibility of accomplices.

would make him an accomplice. But it is a question of law where the facts are not in dispute, when the acts and conduct of the witness are admitted.²

§ 338. Intent and Mental Condition of Defendant.—

Where a specific intent is a necessary element of an offense, the intent is a question of fact to be determined from all the circumstances of the case. And except in a case where the facts proven afford no reasonable ground for an inference as to intent, it is the peculiar province of the jury to find the intent, and to say what particular intent follows from the acts done.³ So also if there is some evidence of the existence of guilty knowledge, the question is for the jury.⁴ It is a question for the jury to determine whether a defendant is insane and to what extent,⁵ whether certain beliefs constitute an insane de-

2. *People v. Coffey*, 161 Cal. 433, 39 L. R. A. (N. S.) 704, 119 Pac. 901; *People v. Truax*, 30 Cal. App. 471, 158 Pac. 510.

3. *People v. Moore*, 155 Cal. 237, 100 Pac. 688; *People v. Barker*, 137 Cal. 557, 70 Pac. 617; *People v. Hite*, 135 Cal. 76, 65 Pac. 57; *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Watson*, 125 Cal. 342, 57 Pac. 1071; *People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *People v. Webster*, 111 Cal. 381, 43 Pac. 1114; *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; *People v. Landman*, 103 Cal. 577, 37 Pac. 518; *People v. Winters*, 93 Cal. 277, 28 Pac. 946; *People v. De Lay*, 80 Cal. 52, 22 Pac. 90; *People v. Swalm*, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67; *People v. Mize*, 80 Cal. 41, 22 Pac. 80; *People v. Soto*, 53 Cal. 415; *People v. Woody*, 48 Cal. 80; *People v. McMakin*, 8 Cal. 547; *People v. Moore*, 8 Cal.

90; *People v. Grider*, 2 Cal. Unrep. 285, 3 Pac. 492; *People v. Wagner*, 43 Cal. App. 248, 184 Pac. 876; *People v. Weston*, 32 Cal. App. 571, 163 Pac. 691; *People v. Kafoury*, 16 Cal. App. 718, 117 Pac. 938; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009; *People v. Claudius*, 8 Cal. App. 597, 97 Pac. 687; *People v. Bowman*, 6 Cal. App. 749, 93 Pac. 198; *People v. Collins*, 5 Cal. App. 654, 91 Pac. 158; *People v. White*, 5 Cal. App. 329, 90 Pac. 471. See *supra*, § 151.

4. *People v. Cummings*, 123 Cal. 269, 55 Pac. 898.

5. *People v. Buck*, 151 Cal. 667, 91 Pac. 529 (holding the question was one for the jury in view of the conflict in the evidence); *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *People v. Easton*, 148 Cal. 50, 82 Pac. 840; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *People v. Goodrum*, 31 Cal. App. 430, 160 Pac. 690.

lusion,⁶ whether, at the time of the commission of the crime, the defendant was so intoxicated as to be incapable of entertaining a specific intent,⁷ or whether he was in fact unconscious at the time of the commission of the crime charged.⁸ In passing upon the issue of sanity or insanity, the jury are not concluded by the report or opinion of medical examiners as to his insanity, or by a judgment declaring him insane and ordering him committed to an asylum. Such reports, judgments and orders are to be regarded by the jury only as evidence bearing on the question of insanity.⁹

§ 339. Questions Relating to Evidence.—It is the province of the judge to rule upon the pertinency, materiality and admissibility of evidence.¹⁰ But the jury are the judges of the weight, effect and value of evidence addressed to them except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates.¹¹ When circumstantial evidence is relied on for a conviction, it is ordinarily for the jury to determine what deductions shall be drawn from the circumstances.¹² When the admissibility of certain evidence depends upon preliminary proof of a collateral fact, the sufficiency of such proof is primarily a question for the court.¹³ But its decision is not conclusive upon the jury,

6. *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329.

7. *People v. Phelan*, 93 Cal. 111, 28 Pac. 855; *People v. Harris*, 29 Cal. 678.

8. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916.

9. *People v. Willard*, 150 Cal. 543, 89 Pac. 124.

10. *People v. Lem You*, 97 Cal. 224, 32 Pac. 11; *People v. Ivey*, 49 Cal. 56; *People v. Williams*, 24 Cal. 31; *People v. Glenn*, 10 Cal. 32.

11. Code Civ. Proc., § 2061; *People v. Argentos*, 156 Cal. 720, 106 Pac. 65; *People v. Riccardi*, 33 Cal. App. Dec. 819, 195 Pac. 448; *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102, 1114. See *infra*, § 579.

12. *People v. Eagan*, 116 Cal. 287, 48 Pac. 120.

13. *People v. Thomson*, 145 Cal. 717, 79 Pac. 435; *People v. Ah How*, 34 Cal. 218; *People v. Jim Ti*, 32 Cal. 60; *People v. Columbus*, 33 Cal. App. Dec. 470, 194 Pac. 288.

if the evidence is admitted.¹⁴ And it is proper to submit to the jury the question as to the existence or nonexistence of the facts essential to the competency of the evidence, and instruct to disregard the evidence if they find against the existence of the facts.¹⁵ After the evidence is admitted, its credibility is entirely within the province of the jury, who are at liberty to weigh all the circumstances, including those already proved to the judge, and give to the testimony only such credit as, upon the whole, they may think it deserves.¹⁶

§ 340. Questions Relating to Witnesses.—The competency of witnesses is a question of law for the trial court.¹⁷ But when the court has found a witness to be competent, it is the peculiar and exclusive province of the jury to decide upon his credibility, and the weight and effect of his testimony.¹⁸ They are the judges of the

See supra § 205. See HOMICIDE, as to application of rule to dying declarations.

14. *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649.

15. *People v. Fowler*, 178 Cal. 659, 174 Pac. 892 (confession); *People v. Thomson*, 145 Cal. 717, 79 Pac. 435 (citing cases from other jurisdictions); *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772 (confession); *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678; *People v. Zarate*, 36 Cal. App. Dec. 250, 201 Pac. 955 (instruction held unobjectionable when the entire instruction was considered); *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649; *People v. Sweetman*, 32 Cal. App. 645, 164 Pac. 627, 628 (opinion of the supreme court in denying a rehearing); *People v. Profumo*, 23 Cal. App. 376, 138 Pac. 109. See supra, § 211, and infra, § 389.

The instruction should not leave

the jury "at liberty" to regard or disregard the evidence, although the collateral facts are not proven to their satisfaction. *People v. Profumo*, 23 Cal. App. 376, 138 Pac. 109. See *People v. Singh*, 182 Cal. 457, 188 Pac. 987, not deciding, however, whether the instruction was erroneous.

16. *People v. Luis*, 158 Cal. 185, 110 Pac. 580; *People v. Thomson*, 145 Cal. 717, 79 Pac. 435.

17. *People v. Stouter*, 142 Cal. 146, 75 Pac. 780; *People v. Bernal*, 10 Cal. 66; *People v. Leroy*, 33 Cal. App. Dec. 486, 194 Pac. 524; *People v. Gasser*, 34 Cal. App. 541, 168 Pac. 157; *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784; *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200; *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712.

18. Code Civ. Proc., § 1847; *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Bauweraerts*,

credibility of the defendant when he offers himself as a witness,¹⁹ of detectives called as witnesses,²⁰ and of accomplices.¹ The law requiring corroboration of the testimony of an accomplice does not forbid the jury to believe him. If there is other evidence which measures up to the requirement tending to connect the defendant with the crime charged, then the testimony of the accomplice is to be considered by them as is any other testimony and given such weight as they may conclude that it is entitled to.²

§ 341. Manner of Weighing Testimony.—Since it is the province and the duty of the jury to determine the credibility of evidence, if, after a full and fair consideration of any evidence, they find it to be unworthy of credit, they may disregard it altogether.³ This power is not an arbitrary one, but should be exercised with legal discretion

164 Cal. 696, 130 Pac. 717; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *People v. Carroll*, 92 Cal. 568, 28 Pac. 600; *People v. Cesena*, 90 Cal. 381, 27 Pac. 300; *People v. Murray*, 86 Cal. 31, 24 Pac. 802; *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425; *People v. Musumeci*, 34 Cal. App. Dec. 546, 197 Pac. 129; *People v. Riccardi*, 33 Cal. App. Dec. 819, 195 Pac. 448; *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124; *People v. Lee Gow*, 38 Cal. App. 248, 175 Pac. 917; *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907; *People v. Horn*, 25 Cal. App. 583, 144 Pac. 641; *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784; *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970; *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712.

19. *People v. Oliveria*, 127 Cal.

376, 59 Pac. 772; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Woody*, 48 Cal. 80; *People v. Alba*, 35 Cal. App. Dec. 160, 199 Pac. 894; *People v. Roselle*, 20 Cal. App. 420, 139 Pac. 477. See *infra*, § 581.

20. *People v. Longland*, 35 Cal. App. Dec. 89, 199 Pac. 546.

1. *People v. Curlee*, 53 Cal. 604; *People v. Gibson*, 53 Cal. 601; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514.

2. *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514.

3. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470; *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201; *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102, 1114.

and in subordination to the rules of evidence.⁴ The jury may, of course, reject testimony which is improbable,⁵ but they are not authorized in arbitrarily rejecting uncontradicted evidence which is in no respect improbable.⁶ Upon the other hand, the jury is not bound to believe the uncontradicted statement of a witness to a fact, because from the manner of the witness or the nature of his whole testimony they may disbelieve him.⁷ In deciding upon the credibility of a witness, it is the duty of the jury to reconcile any apparent conflict in the evidence whether developed upon the whole case or in the testimony of an individual witness,⁸ and they should do so regardless of the conclusions it may lead to.⁹ The jury may believe part of the testimony of a witness and reject the remainder,¹⁰ and because they accept as true statements made by a defendant against himself, it does not follow that they are bound to take as true other statements made in the same conversation in his own behalf.¹¹

In determining the credit to be given the testimony of a witness the jury may consider the conduct, appearance and manner of the witness while on the stand, his interest, if any, in the result of the trial,¹² his age,¹³ his intelligence,¹⁴ his animus toward the defendant,¹⁵ and the probability of his statement being true when considered

4. Code Civ. Proc., § 2061, subd. 1; *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039.

5. *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039.

6. *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039.

7. *People v. Webster*, 111 Cal. 381, 43 Pac. 1114; *People v. Murray*, 86 Cal. 31, 24 Pac. 802; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 511, holding that a jury need not believe a part of an unsworn declaration of a defendant not directly contradicted.

8. *People v. Madden*, 76 Cal. 521, 18 Pac. 402; *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907.

9. *People v. Madden*, 76 Cal. 521, 18 Pac. 402.

10. *People v. Roselle*, 20 Cal. App. 420, 129 Pac. 477.

11. *People v. Graham*, 21 Cal. 261.

12. See *infra*, § 348.

13. *People v. Delaney*, 35 Cal. App. Dec. 273, 199 Pac. 896.

14. See *infra*, § 348.

15. *People v. Kaufman*, 33 Cal. App. Dec. 338, 193 Pac. 953.

with reference to the other evidence, facts and circumstances in the case. So also they may consider the fact he has previously been convicted of a felony, although they are not precluded from believing a felon.¹⁶ It is the duty of the jury to consider facts brought out upon the cross-examination of a witness as well as those adduced on direct examination. Accordingly, when particular wrongful acts of an impeached witness are brought out upon the cross-examination of a character witness, such acts may be considered by the jury as affecting the credibility of the impeached witness.¹⁷ But in prosecutions for sexual crimes upon females, evidence of the moral delinquency of the female is not admissible as affecting her general credibility.¹⁸ However, the conduct of the witness at the time of the commission of the offense charged may be considered as affecting the value and weight of her testimony.¹⁹ The jury is not required to give the same weight to the defendant's testimony as they would give to any other witness.²⁰

§ 342. "False in One Thing, False in Everything."—The Code of Civil Procedure provides that a witness false in one part of his testimony is to be distrusted in others.¹ This provision, like the terse maxim which it paraphrases, "*Falsus in uno, falsus in omnibus*," is not a complete exposition of the law. The rule is that the jury may reject the whole of the testimony of a witness who has willfully sworn falsely to a material fact,² that is to say, the jury

16. *People v. Riccardi*, 33 Cal. App. Dec. 819, 195 Pac. 448. *Cruse*, 24 Cal. App. 497, 141 Pac. 936.

17. *People v. Sprague*, 35 Cal. App. Dec. 13, 198 Pac. 820. 19. *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484.

18. *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9; *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; 20. *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919.

People v. Murphy, 35 Cal. App. Dec. 618, 200 Pac. 484; *People v.* 1. Code Civ. Proc., § 2061, subd. 3.

2. *People v. Thomson*, 145 Cal. 717, 79 Pac. 435; *People v. Plyler*,

being convinced that a witness has said what was untrue, not as the result of mistake or inadvertence, but willfully and with the design to deceive, must treat all his testimony with distrust and suspicion, and reject all unless they shall be convinced that he has in other particulars sworn to the truth.³ The jury is not required to reject the testimony of a witness who willfully swears falsely, however. His testimony is still evidence in the case which they must receive and weigh. While they may reject it, they may, as they determine, accept as true one of the contradictory asseverations.⁴

§ 343. Taking Case from Jury—Directed or Advised Verdict.

“If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice.”⁵

Under this provision it is the duty of a court to advise the jury to acquit if the evidence is insufficient to justify a conviction,⁶ as, for example, when there is a clear failure of proof of a material allegation of the charge,⁷ or

121 Cal. 160, 53 Pac. 553; *People v. Luchetti*, 119 Cal. 501, 51 Pac. 707; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Sprague*, 53 Cal. 491; *People v. Strong*, 30 Cal. 151; *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075; *People v. Davis*, 14 Cal. App. 117, 111 Pac. 268.

This rule is applicable to dying declarations. *People v. Thomson*, 145 Cal. 717, 79 Pac. 435.

3. *People v. Kelly*, 146 Cal. 119, 79 Pac. 846; *People v. Soto*, 59 Cal. 367; *People v. Sprague*, 53 Cal. 491.

4. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People*

v. Hicks, 53 Cal. 354; *People v. Eckert*, 16 Cal. 110; *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907; *People v. Crawford*, 24 Cal. App. 396, 141 Pac. 824; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435; *People v. Delucchi*, 17 Cal. App. 96, 118 Pac. 935; *In re Vandiveer*, 4 Cal. App. 650, 88 Pac. 993.

5. Pen. Code, § 1118; *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470.

6. *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703.

7. *People v. Ward*, 145 Cal. 736, 79 Pac. 448.

when there is insufficient corroborating evidence in a case where corroboration is required,⁸ or when there is no evidence to prove the corpus delicti, independently of the extrajudicial confessions or admissions of the defendant.⁹ The court cannot, however, advise an acquittal upon the opening statement of the prosecution, as such statement is not evidence within the meaning of the code provision.¹⁰

The code provision does not give a trial court the power to determine as a matter of law that the evidence of the prosecution is insufficient to justify a conviction,¹¹ and under no circumstances is it authorized to command a jury to return a verdict of acquittal.¹² Any such direction or command is not only erroneous but void.¹³ After the submission of the case upon the evidence, however weak, it is still the duty of the jury to pass upon its sufficiency, and find a verdict according to its own best judgment, paying all due respect to the advice of the court as to its insufficiency.¹⁴ Although this distinction between the power of the court to advise and to compel a verdict is an important one in some aspects of the question, it would be sacrificing substance to form to deny an oral motion for a verdict because counsel uses the word "instruct" instead of "advise."¹⁵ However, it seems to

8. *People v. Davis*, 135 Cal. 162, 67 Pac. 59. See *People v. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416, holding that the court may refuse to advise an acquittal, if the corroboration, though slight, is sufficient to go to the jury.

9. *People v. Ward*, 145 Cal. 736, 79 Pac. 448; *People v. Jones*, 31 Cal. 565.

10. *People v. Moran*, 144 Cal. 48, 77 Pac. 777; *People v. Stoll*, 143 Cal. 689, 77 Pac. 818; *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604. See *supra*, § 322.

11. *People v. Stoll*, 143 Cal. 689,

77 Pac. 818; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720.

12. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818; *People v. Terrill*, 132 Cal. 497, 64 Pac. 894; *People v. Davis*, 135 Cal. 162, 67 Pac. 59; *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Horn*, 70 Cal. 17, 11 Pac. 470.

13. *People v. Davis*, 135 Cal. 162, 67 Pac. 59.

14. *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016.

15. *People v. Ward*, 145 Cal. 736, 79 Pac. 448.

have been held, although the case is not clear, that a written instruction so worded may be refused.¹⁶

For prosecution.—While the question of once in jeopardy and former acquittal is ordinarily one of fact, the question becomes one of law when the evidence in support thereof is uncontradicted and is insufficient to sustain the plea as a matter of law.¹⁷ When such is the case it is proper for the trial court to instruct the jury to find for the prosecution upon this issue.¹⁸

Invasion by Court of Province of Jury.

§ 344. In General.—While it is the practice in the English courts and in the federal courts and also in many of the states for the judges to charge the jury as to matters of fact, it is expressly laid down by the constitution in California that

“Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.”¹⁹

This constitutional prohibition has been jealously guarded and rigidly upheld from the earliest judicial his-

16. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720. The opinion in this case merely states that “counsel for defendants moved the court as follows.” But this case was distinguished in *People v. Ward*, 145 Cal. 736, 79 Pac. 448, on the ground the requested instruction was in writing.

17. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15.

18. *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15 (former acquittal and once in jeopardy); *People v. Tucker*, 117 Cal. 229, 49 Pac. 134; *People v.*

Smalling, 94 Cal. 112, 29 Pac. 421; *People v. Palassou*, 14 Cal. App. 123, 111 Pac. 109. See *People v. Way*, 11 Cal. 392, holding the plea was properly overruled when not supported by evidence.

19. Const., art. VI, § 19; *People v. Glaze*, 139 Cal. 154, 72 Pac. 965; *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; *People v. Hertz*, 105 Cal. 660, 39 Pac. 32; *People v. Landman*, 103 Cal. 577, 37 Pac. 518; *People v. Vereneseneckcockchockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. Horn*, 25 Cal. App. 583, 144 Pac. 641; *People v. Muhly*, 15 Cal. App. 416, 114 Pac. 1017.

tory of the state.²⁰ The provision has reference to the familiar proposition that it is the province of the court to declare the law, and of the jury to determine all matters of fact, and its meaning is that judges shall not invade or usurp the powers of the jury.¹ The provision is plainly coextensive with the exclusive province of the jury. If there are rules of law to control and guide, then these may be declared authoritatively; but beyond this the court cannot go without violating this plain inhibition.² A judge cannot be too cautious in a criminal trial in avoiding all interference with the jury upon the facts.³ And he should be particularly careful, when giving instructions, not to use language which might be naturally understood by the jury as intimating his opinion that the defendant was guilty, or as an argument against him.⁴

Notwithstanding the constitutional prohibition against charging juries with respect to matters of fact, it may become the duty of the judge to determine whether there is any evidence to sustain the main issue or to sustain any fact upon which a particular judgment must necessarily depend, and in a proper case the court may act upon the assumption that there is no evidence in respect to a particular issue, and advise an acquittal or frame his charge without reference to the existence of facts as to which no evidence has been produced.⁵

20. *People v. Worthington*, 115 Cal. 242, 46 Pac. 1061; *People v. Gordon*, 88 Cal. 422, 26 Pac. 502.

1. *People v. Vereneseneckcockcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. Chew Sing Wing*, 88 Cal. 268, 25 Pac. 1099; *People v. Ybarra*, 17 Cal. 166.

2. *People v. Vereneseneckcockcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

3. *People v. Stanton*, 106 Cal. 139, 39 Pac. 525; *People v. Hertz*, 105 Cal. 660, 39 Pac. 32; *People v. Choynski*, 95 Cal. 640, 30 Pac. 791;

People v. Gordon, 88 Cal. 422, 26 Pac. 502; *People v. Williams*, 17 Cal. 142.

4. *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92, 66 L. R. A. 247, 76 Pac. 954. The charge should be so fair, impersonal, and well-balanced that the jurors who are to be guided by it will be unable to deduce therefrom the opinion of the judge as to the guilt or innocence of the accused. *People v. Stanton*, 106 Cal. 139, 39 Pac. 525.

5. *People v. Welch*, 49 Cal. 174.

§ 345. Application of Rule.—While under the constitution a judge may state the evidence,⁶ he is not permitted to comment upon the facts,⁷ upon the weight and sufficiency of the evidence,⁸ or upon the credibility of witnesses.⁹ A court may not argue to the jury the relative importance of evidence, except as that is settled by some rule of law.¹⁰ Neither may it declare as a matter of law that any fact or facts are established by the evidence;¹¹ nor that any particular evidence is or is not entitled to receive weight or consideration from the jury,¹² or command the jury to arrive at a conclusion as to an essential element.¹³ For example, it would be erroneous for the trial court to state that the defendant has failed to make out his defense,¹⁴ or that his innocence conclusively appears.¹⁵ So also the court is not permitted to charge the jury that certain evidence is to be viewed with cau-

6. See *infra*, § 354.

7. *People v. Barney*, 114 Cal. 554, 47 Pac. 41.

8. *People v. Vereneseneckcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112; *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People v. Samonset*, 97 Cal. 448, 32 Pac. 520; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *People v. Chew Sing Wing*, 88 Cal. 268, 25 Pac. 1099; *People v. Travers*, 88 Cal. 233, 26 Pac. 88; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Dick*, 34 Cal. 663; *People v. Ybarra*, 17 Cal. 166; *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884; *People v. Lytle*, 34 Cal. App. 360, 167 Pac. 552, holding the instruction in question was not objectionable as being upon the weight of expert evidence as to handwriting.

9. See *infra*, § 347.

10. *People v. Vereneseneckcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. Howland*, 13 Cal. App. 363, 109 Pac. 894. See *infra*, § 346.

11. *People v. Vereneseneckcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137.

12. *People v. Barry*, 31 Cal. 357.

13. An instruction that as to the intent, "You must arrive at it from all the testimony in the case," is not objectionable as commanding the jury to arrive at a conclusion as to intent, when the jury are elsewhere fully instructed as to the doctrine of reasonable doubt. *People v. Gilmore*, 6 Cal. Unrep. 57, 53 Pac. 806.

14. *People v. Melendrez*, 129 Cal. 549, 62 Pac. 109.

15. *People v. Streuber*, 121 Cal. 431, 53 Pac. 431, 53 Pac. 918.

tion,¹⁶ or that a particular circumstance is a "strong" circumstance in the case.¹⁷ As stated in an early case, this provision of the constitution is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case or to take away their exclusive right to weigh the evidence and determine the facts.¹⁸

Upon the other hand, however, a court may fairly state the issues, and the theories and the claims of the parties, for the purpose of making a proper application of the law arising in the case.¹⁹ And it is not prejudicial error to use such expressions as "it is insisted," "it is contended," or "it is claimed," etc., when referring to an asserted right invoked by the defendant.²⁰ And in a case where the court in an instruction upon the subject of alibi used the expression "the attempt of the accused to prove an alibi does not shift the burden of proof from the prosecution," etc., it was held that the use of the word "attempt," though not the best that could have been used, was not, considering the context of the instruction, prejudicial to the defendant.¹ The word "attempt" as used in an instruction does not, it has been said, cast any slur or discredit upon the evidence of the defendant,² since whether a fact has been proved is for the jury to decide. A mere statement that there is a conflict in the testimony relating to a particular point is not objectionable as an expression upon the weight of evidence.³ It is

16. See *infra*, § 356.

17. *People v. Ah Sing*, 59 Cal. 400. See *infra*, § 353.

18. *People v. Ybarra*, 17 Cal. 166, quoted in *People v. Chew Sing Wing*, 88 Cal. 268, 25 Pac. 1099.

19. *People v. Donnelly*, 143 Cal. 394, 77 Pac. 177; *People v. Hitchcock*, 104 Cal. 482, 38 Pac. 198; *People v. Worden*, 113 Cal. 569, 45 Pac. 844.

20. *People v. Glover*, 141 Cal. 233, 74 Pac. 745.

1. *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

2. *People v. Swarbrick*, 77 Cal. 125, 19 Pac. 374.

3. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102. See *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12, where the court says it is dangerous practice to state that there

not a violation of the constitution for the judge to address language to counsel intended merely to explain the reasons why he made certain rulings, and not to guide the jury.⁴ And it is not improper in such case to caution the jury against concluding from the ruling of the court that the judge had determined that the defendant was guilty.⁵

§ 346. Circumstantial Evidence.—The law declares nothing as to the relative probative force of direct and circumstantial evidence, and it is wholly a matter for the jury to determine, according to their convictions, from the evidence. An instruction to the jury that circumstantial evidence is not entitled to a less degree of credit than direct evidence, and that circumstances are not likely to be fabricated, is an instruction as to matter of fact within the prohibition of the constitution.⁶ While it has frequently been held not to be reversible error to instruct the jury that there is nothing in the nature of circumstantial evidence rendering it less reliable than other classes of testimony, and that “a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts which, if true, the facts on which the guilt or innocence depends must inevitably follow”⁷—where the instruc-

is an irreconcilable conflict in the evidence.

4. *People v. McLean*, 84 Cal. 480, 24 Pac. 32; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

5. *People v. Johnson*, 104 Cal. 418, 38 Pac. 91, holding the instruction is not a charge as to the effect of evidence because it states the court denied the motion “because there is testimony enough before you to sustain a conviction, provided you believe it.”

6. *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389; *People v. Vereneseneckockockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111 (over-

ruling *People v. Cronin*, 34 Cal. 191, as to the doctrine of that case as to the relative weight of direct and circumstantial evidence); *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861. See *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347 (this case being based upon the *Cronin* case, *supra*, necessarily falls with it).

See note, 15 A. L. R. 1049, as to duty of court to charge with respect to circumstantial evidence.

7. *People v. Ung Sing*, 171 Cal. 83, 151 Pac. 1145; *People v. Howard*, 135 Cal. 266, 67 Pac. 148; *People v. Wilder*, 134 Cal. 182, 66 Pac. 228; *People v. Urquidas*, 96

tion, considered with the remainder of the charge, can be understood as meaning that a verdict might be based upon circumstantial as well as direct evidence⁸—nevertheless such a charge has been said to be more in the nature of argument than a declaration of law, and that it may as well be omitted.⁹ It is clearly improper, however, for the trial court to go further and say that circumstantial evidence is not likely to be fabricated,¹⁰ or that it is sometimes even more satisfactory than the testimony of a single individual who swears he has seen an act committed.¹¹

An instruction stating the nature and elements of circumstantial evidence without a special reference to the case in hand is not an instruction upon matters of fact.¹² And an instruction telling the jury that circumstantial evidence is "legal and competent" is not necessarily objectionable as an intimation to the jury that it is sufficient to convict.¹³

§ 347. Credibility of Witnesses.—A trial judge should not interfere with the province of the jury in passing upon the credibility of witnesses.¹⁴ He should not, therefore, comment on the degree of credit to be accorded to their

Cal. 239, 31 Pac. 52; *People v. Morrow*, 60 Cal. 142; *People v. Anthony*, 56 Cal. 397; *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477; *People v. Simmons*, 7 Cal. App. 559, 95 Pac. 48. See *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971, holding a somewhat similar instruction was not in violation of the constitution. But see *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297, holding as to the latter part of the instruction, that there is no necessity or justification in instructing a jury that witnesses may lie.

8. *People v. Simmons*, 7 Cal. App. 559, 95 Pac. 48.

9. *People v. Ung Sing*, 171 Cal. 83, 151 Pac. 1145; *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971.

10. *People v. Botkin*, 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286; *People v. Vereneseneckcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111; *People v. Howland*, 13 Cal. App. 363, 109 Pac. 894.

11. *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

12. *People v. Fealy*, 33 Cal. App. 605, 165 Pac. 1034.

13. *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389.

14. See cases cited *infra*.

testimony, or the probability of their sworn statements.¹⁵ It is a violation of this rule to instruct a jury that they are bound to take the testimony of any witness as true,¹⁶ or that they must give some weight to the testimony of a witness, however unworthy of belief they may find him,¹⁷ or that the credibility of a witness was unjustly assailed,¹⁸ or to instruct them that a former conviction deprives witnesses of any portion of the credit presumptively due to their testimony.¹⁹ So also an instruction would be an invasion of the jury's province which intimates that the defendant is entitled to little credit as a witness,²⁰ or which requires some weight to be given his testimony, however unworthy of belief it may be found.¹ But it has been held that the court may properly instruct a jury that when it clearly appears in the course of a trial that a character witness had not the knowledge or information requisite to enable him to testify on the subject, the court may properly instruct the jury that his testimony is not entitled to any weight.² It is not improper to modify an instruction stating how a witness may be impeached, by adding the clause that the jury are the exclusive judges of his credibility.³

15. *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Lang*, 104 Cal. 363, 37 Pac. 1031; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396.

16. *People v. Murray*, 86 Cal. 31, 24 Pac. 802; *People v. Eckert*, 16 Cal. 110.

17. *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

18. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

19. *People v. McLane*, 60 Cal. 412.

20. *People v. Murray*, 86 Cal. 31, 24 Pac. 802, where the court advised the jury it was for them to determine how much credit a man convicted of petit larceny was entitled to.

1. *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

2. *People v. Velarde*, 59 Cal. 457 (where the court instructed the jury that the fact of good character must be proved by competent evidence).

3. *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

§ 348. **Manner of Weighing Testimony.**—It is not proper for the court to direct the jury as to the ways and methods by which they shall exercise their power of weighing the testimony.⁴ Still, a general instruction based upon section 1847 of the Code of Civil Procedure, informing them that in determining the weight of the testimony, they may consider the circumstances under which the witnesses testified, their conduct on the stand, their general appearance and demeanor, and the motives which actuate them in testifying, or in giving contradictory or false testimony, merely tells the jury to do what it evidently would do without being told and is not reversible error.⁵ Nor is an instruction rendered objectionable in this respect because it informs the jury that they may also consider the degree of intelligence of the witness,⁶ and his interest in the case, or his bias or prejudice, if any,⁷ and the consequences resulting to a witness, if any, from the result of the trial.⁸ Such instructions, if given, should be made applicable to all the witnesses or to all the testimony, and are objectionable if directed at a particular witness.⁹

4. *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405.

5. *People v. Wong Bin*, 139 Cal. 60, 72 Pac. 505; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405; *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *People v. Stennett*, 34 Cal. App. Dec. 501, 783, 197 Pac. 372; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825. See *People v. Machuca*, 158 Cal. 62, 109 Pac. 886, holding that it was not reversible error to refuse an instruction to consider the motive of the witness in weighing his testimony; and *People v. Iden*, 24 Cal. App. 627, 142 Pac. 117, holding that the refusal of an instruction was not error when covered by other instructions.

6. *People v. Miles*, 143 Cal. 636, 77 Pac. 666.

7. *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825; *People v. Matezowski*, 11 Cal. App. 465, 105 Pac. 425; *People v. Sheffield*, 9 Cal. App. 130, 98 Pac. 67; *People v. Waysman*, 1 Cal. App. 246, 81 Pac. 1087.

8. *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861.

9. *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690; *People v. Gordan*, 103 Cal. 568, 37 Pac. 534; *People v. Blunkall*, 31 Cal. App. 778, 161 Pac. 997; *People v. Bartol*, 24 Cal. App. 659, 142 Pac. 510. See *infra*, § 349.

It has been held that an instruction to consider the character of the witnesses in passing upon their credibility, is not erroneous when there is evidence before the jury as to the character of each witness called.¹⁰

§ 349. Singling Out Evidence for Purposes of Comment.

Instructions should be general and not confined to the testimony on one side of the case.¹¹ Neither should they single out the testimony of a particular witness for comment or bear upon the weight to be attached to a particular piece of evidence, as their effect may be either to convey to the jury the impression that the judge is suspicious of the testimony against which his instruction is particularly directed, or give added weight to the testimony, depending upon the nature of the comment.¹² Accordingly, an instruction that the jury is not bound to believe the uncontradicted testimony of a witness for the prosecution is properly refused because directed specially against the testimony on one side of the case.¹³ And for like reason, an instruction that the moral delinquency of the complaining witness is not to be considered as affecting his or her credibility is improper.¹⁴ However, it is

10. *People v. Williams*, 75 Cal. 306, 17 Pac. 211. See *People v. Edson*, 68 Cal. 549, 10 Pac. 192, where the instruction was held misleading.

11. *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586.

12. *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690; *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. Patterson*, 124 Cal. 102, 56 Pac. 882; *People v. Gordan*, 103 Cal. 568, 37 Pac. 534; *People v. Demousset*, 71 Cal. 611, 12 Pac. 788; *People v. Fritz*, 36 Cal. App. Dec. 61, 201 Pac. 348; *People v. Carey*, 35 Cal. App. Dec. 829, 200 Pac. 835; *People v. Long-*

land, 35 Cal. App. Dec. 89, 199 Pac. 546; *People v. Blunkall*, 31 Cal. App. 778, 161 Pac. 997; *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734; *People v. Horn*, 25 Cal. App. 583, 144 Pac. 641; *People v. Bartol*, 24 Cal. App. 659, 142 Pac. 510; *People v. Kawasaki*, 23 Cal. App. 92, 137 Pac. 287; *People v. Emmons*, 7 Cal. App. 683, 95 Pac. 1032; *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172. See *infra*, § 394, instruction as to credibility of defendant.

13. *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Jacobs*, 16 Cal. App. 478, 117 Pac. 615.

14. *People v. Carey*, 35 Cal. App. Dec. 829, 200 Pac. 835.

not ground for reversal if the record fails to show that the defendant was prejudiced by it.¹⁵ So also an instruction directing a jury in judging the credibility of witnesses for the defendant that they are to consider the fact that they are related to the defendant, and whether their interest may not color their testimony, is erroneous as a charge upon the facts.¹⁶ But an instruction does not constitute reversible error where it relates to commonplace matters which are obvious without being pointed out.¹⁷

§ 350. Corroboration.—A court may instruct the jury as to the necessity of corroboration in those cases in which the law requires it.¹⁸ So also where corroboration of the prosecuting witness is not necessary, it is proper to charge the jury that it is not essential to a conviction that the prosecuting witness should be corroborated, but that it is sufficient if they believe beyond a reasonable doubt from all the evidence in the case that the crime charged has in fact been committed as alleged.¹⁹ Such an instruction is not objectionable as singling out the testimony of the prosecuting witness, or as stating that his testimony should be accepted as true or that it sufficiently establishes guilt. It would be erroneous, however, in a case in which proof of a specific intent is essential, to direct a conviction if the jury believe a particular witness. Such instruction withdraws the question of intent from the jury, as it assumes the existence of every fact necessary to conviction except the truth of the testimony to which it relates, and compels the jury to render a ver-

15. *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484; *People v. Williams*, 35 Cal. App. Dec. 115, 199 Pac. 56; *People v. Cruse*, 24 Cal. App. 497, 141 Pac. 936.

16. *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315; *People v. Hertz*, 105 Cal. 660, 39 Pac. 32.

17. *People v. Bush*, 71 Cal. 602, 12 Pac. 781; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375.

18. See *infra*, § 390.

19. *People v. Akey*, 163 Cal. 54, 124 Pac. 718 (rape); *People v. Pyle*, 44 Cal. App. 130, 185 Pac. 1019 (embezzlement).

dict in accordance with their opinion upon that question,²⁰ This objection, however, does not extend to an instruction as to what must be proved and stating that if the testimony of the prosecutrix convinces them beyond a reasonable doubt of the defendant's guilt, it is sufficient without other corroborating circumstances.¹ Nor, as already stated, does it extend to an instruction authorizing a conviction if the jury believe the defendant guilty, from all the evidence, not from that of the prosecuting witness alone.²

§ 351. Assumption of Facts.—It is an invasion of the province of the jury for the court in its instructions to assume the existence of a fact which is not in evidence, or which is to be determined by the jury on evidence however slight, or on a conflict of evidence.³ A court should not directly or indirectly assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression.⁴ Nor should it assume that the corpus delicti

20. *People v. Barker*, 137 Cal. 557, 70 Pac. 617 (rape); *People v. Johnson*, 106 Cal. 289, 39 Pac. 622 (rape); *People v. Ybarra*, 17 Cal. 166 (where the court directed a conviction if they found dying declarations to be true); *People v. Ah Fung*, 16 Cal. 137 (homicide); *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112 (rape).

Such an instruction is not objectionable, however, in a prosecution for rape of a child, in which the copulation constitutes the offense and the intent is immaterial: *People v. Wessel*, 98 Cal. 352, 33 Pac. 216; *People v. Liggett*, 18 Cal. App. 367, 123 Pac. 225.

1. *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *People v. Von Perhacs*, 20 Cal. App. 48, 127 Pac. 1028.

2. See *supra*, this section.

3. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. Lee*, 119 Cal. 84, 51 Pac. 22; *People v. Roemer*, 114 Cal. 51, 45 Pac. 1003; *People v. Lee Chuck*, 74 Cal. 30, 15 Pac. 322; *People v. Messersmith*, 61 Cal. 246; *People v. Buster*, 53 Cal. 612; *People v. Atherton*, 51 Cal. 495; *People v. Dick*, 32 Cal. 213; *People v. Strong*, 30 Cal. 151; *People v. Williams*, 17 Cal. 142; *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505; *People v. Carabin*, 14 Cal. 438; *People v. Woodcock*, 62 Cal. Dec. 53, 35 Cal. App. Dec. 29, 199 Pac. 565; *People v. Sprague*, 35 Cal. App. Dec. 13, 198 Pac. 820 (instruction held unobjectionable); *People v. Goodrum*, 31 Cal. App. 430, 160 Pac. 690; *People v. White*, 19 Cal. App. 555, 126 Pac. 505.

4. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. Lana-*

has been established, although any error in doing so may be obviated by a plain unequivocal submission of the question to the jury.⁵ However, a charge which assumes a fact to be proven will not always and necessarily be held to be erroneous, if from the immediate context or elsewhere in the instructions, it appears that the existence or nonexistence of the fact was left to be determined by the jury.⁶

It is not error for a court to assume the existence of a fact that has been admitted.⁷ But the mere fact that the statements of a witness are uncontradicted does not authorize the court to instruct the jury that the fact is conclusively established as a matter of law.⁸ The plea of "not guilty" puts in issue every material fact, and though not controverted by countervailing evidence, it is the right of the defendant to have the jury pass upon every material fact.⁹ Accordingly, it was held in an early case that the trial court has no right to assume the existence of any fact not expressly admitted.¹⁰ Yet, notwithstanding this holding, it has repeatedly been held that it is not reversible error for a court to assume the existence of a fact if it is admitted, or if there is no shadow of a

gan, 81 Cal. 142, 22 Pac. 482; *People v. Bishop*, 81 Cal. 113, 22 Pac. 477; *People v. Murback*, 64 Cal. 369, 30 Pac. 608 (instruction held unobjectionable); *People v. Ramirez*, 56 Cal. 533, 557, 38 Am. Rep. 73; *People v. Williams*, 17 Cal. 142; *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868 (holding an instruction as to degree of crime does not assume guilt); *People v. Currie*, 16 Cal. App. 731, 117 Pac. 941 (holding the instruction in question was not objectionable in this respect); *People v. Howland*, 13 Cal. App. 364, 109 Pac. 894.

5. *People v. Dick*, 37 Cal. 277.

6. *People v. Hurtado*, 63 Cal. 288. See *infra*, § 352.

7. *People v. Hobson*, 17 Cal. 424. See cases cited *infra*, this section.

8. *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Webster*, 111 Cal. 381, 43 Pac. 1114; *People v. Dufur*, 34 Cal. App. 644, 654, 168 Pac. 590.

9. *People v. Dufur*, 34 Cal. App. 644, 654, 168 Pac. 590.

10. *People v. Ah Fung*, 16 Cal. 137.

conflict of evidence with respect thereto and to instruct the jury as to its legal effect.¹¹

§ 352. Application of Rule.—An instruction is not objectionable, as assuming the existence of facts, which states the facts hypothetically and directs the jury to find the defendant guilty if they find the facts stated therein from the evidence.¹² Neither is an instruction objectionable which deals with questions in the abstract, and announces general principles of law governing cases where such questions are involved.¹³ In a prosecution for homicide, the use of the word “victim” as applicable to the deceased has been held to be improper because it seems to assume that the deceased was wrongfully killed, and is nearly equivalent to an expression characterizing the defendant as the criminal.¹⁴ So also an instruction which refers to “the killing” may, when taken by itself, be defective in assuming the guilt of the defendant. But it is unobjectionable when it relates to an abstract proposition of law and cannot, in the light of other instructions be misunderstood by the jury.¹⁵ An instruction that “the commission of the homicide by the defendant being proved,” the burden

11. *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *People v. Allen*, 144 Cal. 299, 77 Pac. 948; *People v. Putman*, 129 Cal. 258, 61 Pac. 961; *People v. Worthington*, 115 Cal. 242, 46 Pac. 1061; *Dean v. Ross*, 105 Cal. 227, 38 Pac. 912; *People v. Mallon*, 103 Cal. 513, 37 Pac. 512; *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310; *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *People v. McFadden*, 65 Cal. 445, 4 Pac. 421; *People v. Messersmith*, 61 Cal. 246; *People v. Scott*, 22 Cal. App. 54, 62, 133 Pac. 496.

12. *People v. Cobler*, 108 Cal. 538, 41 Pac. 401. See *infra*, § 372.

13. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *People v. Kehoe*,

123 Cal. 224, 69 Am. St. Rep. 52, 55 Pac. 911; *People v. Davis*, 1 Cal. App. 8, 14, 81 Pac. 716, 88 Pac. 1101.

14. *People v. Williams*, 17 Cal. 142; distinguished in *People v. Ramirez*, 56 Cal. 533, 537, 33 Am. Rep. 73, which holds the objection is not applicable to the phrase “the deceased was slain,” as the phrase was used by the court.

15. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612; *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021; *People v. Williams*, 75 Cal. 306, 17 Pac. 211; *People v. Welch*, 49 Cal. 174, 180.

of proving circumstances of mitigation rests on the defendant, is not objectionable as assuming that the facts had been proven, where the jury is told that they are the exclusive judges of the facts, and where the signification of the clause is the same as if the sentence had begun, "When the commission of the homicide by the defendant has been proved."¹⁶

§ 353. Inferences from Facts.—While a court may instruct the jury with reference to presumptions of law,¹⁷ it is the exclusive province of a jury to draw inferences of fact from facts established by the evidence.¹⁸ Hence, the court should not charge the jury that a presumption of law arises from a particular fact when it is a case merely in which they may draw an inference therefrom.¹⁹ Likewise, it is error to instruct the jury that a strong presumption of guilt arises from flight,²⁰ or that the silence of the defendant tends to prove his guilt,¹ or that an unexplained possession of stolen property raises a presumption of guilt,² or that possession of a forged instrument and an endeavor to obtain money upon it raises a presumption of guilt of forgery,³ or that the unexplained possession of a key raises a reasonable presumption that the defendant had it for the purpose shown by the evi-

16. *People v. Wilt*, 173 Cal. 477, 160 Pac. 561; *People v. Grill*, 151 Cal. 592, 91 Pac. 515 (distinguishing *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001); *People v. Caballero*, 41 Cal. App. 146, 182 Pac. 321.

17. *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *People v. Crowl*, 4 Cal. Unrep. 355, 34 Pac. 860. See *infra*, §§ 384-386.

18. *People v. Slater*, 119 Cal. 620, 51 Pac. 957; *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *People v. Doyell*, 48 Cal. 85, 89, 97; *People v. Levison*, 16 Cal. 98, 76

Am. Dec. 505; *People v. Calpestri*, 35 Cal. App. Dec. 883, 200 Pac. 1054.

19. *People v. Mitchell*, 55 Cal. 236; *People v. Calpestri*, 35 Cal. App. Dec. 883, 200 Pac. 1054.

20. *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69. See *infra*, § 388.

1. *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884.

2. *People v. Mitchell*, 55 Cal. 236. See LARCENY.

3. *People v. Calpestri*, 35 Cal. App. Dec. 883, 200 Pac. 1054.

dence it could be used for,⁴ or that an unexplained failure of an officer to pay over money raises a presumption of felonious appropriation.⁵ So also it is error, in a case in which it is necessary to draw an inference of fact, to tell the jury that, as a matter of law, one fact does not prove another,⁶ or that certain facts raise a presumption that the crime charged was not committed, where this is equivalent to saying that the facts constitute evidence that no crime was committed.⁷ It is not error, however, to instruct the jury, in the language of section 1960 of the Code of Civil Procedure, when an inference may arise,⁸ nor to charge that certain matters are circumstances from which they can infer guilt.⁹

Statement of Evidence.

§ 354. **In General.**—Under the constitution, judges may still, as formerly, state the evidence for the purpose of pointing their instructions and making their pertinency apparent to the jury, if they assume no fact as proven, and state nothing by way of argument thereon.¹⁰ And this right includes the right to state that there is no evidence as to particular facts, if the evidence justifies the assertion.¹¹ It is dangerous, however, for a court to at-

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| <p>4. <i>People v. Walden</i>, 51 Cal. 588.
 5. <i>People v. Carillo</i>, 54 Cal. 63.
 6. <i>People v. Messersmith</i>, 61 Cal. 246.
 7. <i>People v. Williams</i>, 24 Cal. App. 646, 142 Pac. 124.
 8. <i>People v. Balkwell</i>, 143 Cal. 259, 76 Pac. 1017.
 9. <i>People v. Ross</i>, 115 Cal. 233, 46 Pac. 1059. See <i>infra</i>, § 388, instruction as to flight.
 10. <i>People v. Fowler</i>, 178 Cal. 657, 368, 174 Pac. 892 ("the court was authorized to state the testimony, if it was uncontradicted"); <i>People v. Roberts</i>, 122 Cal. 377, 55 Pac.</p> | <p>137; <i>People v. Brittan</i>, 118 Cal. 409, 50 Pac. 664; <i>People v. King</i>, 27 Cal. 507, 87 Am. Dec. 95; <i>People v. Wilson</i>, 23 Cal. App. 513, 522, 138 Pac. 971. See <i>People v. Wong Ah Foo</i>, 69 Cal. 180, 10 Pac. 375, holding that it is not error to inform the jury there is some evidence in the case of a circumstantial nature.
 11. <i>People v. Sternberg</i>, 11 Cal. 3, 10, 43 Pac. 198; <i>People v. Dick</i>, 34 Cal. 663; <i>People v. King</i>, 27 Cal. 507, 87 Am. Dec. 95. Compare <i>People v. King</i>, 4 Cal. App. 213, 87 Pac. 400, holding that an in-</p> |
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tempt to state the evidence, as the attempt usually results in an instruction upon the facts, or upon the supposed facts, which is both argumentative and unjust.¹² In fact, it has been said that a court should never say whether there is or is not any evidence tending to prove an essential fact to aid the jury in determining a controverted issue of fact, or when it is open to reasonable dispute as to whether such evidence does tend to prove the alleged fact.¹³

In accordance with these rules, it is not error to state that evidence has been introduced "tending to show" certain facts, as evidence is only admissible when it tends to prove a material fact, and upon its admission it should be deemed that it tends to prove the fact.¹⁴ But to state that the testimony "shows" certain facts is error, as it is for the jury to determine what the testimony shows.¹⁵ And an instruction that there has been no evidence introduced which tends to show any justification for the crime alleged is near the border line of error as charging upon matters of fact.¹⁶

§ 355. Manner of Stating Evidence.—In stating the evidence the judge should do so with fairness¹⁷ and exact-

struction that there is no evidence of a conspiracy is one upon a matter of fact and is properly refused; and *People v. Roberts*, 6 Cal. 214, holding that an instruction that "there was no evidence of express malice in the case" was properly denied because forbidden by the constitution.

12. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. Gordon*, 88 Cal. 422, 426, 26 Pac. 502.

13. *People v. Totman*, 135 Cal. 136, 67 Pac. 51; *People v. Lee*, 119 Cal. 84, 51 Pac. 22.

14. *People v. Flannelly*, 128 Cal. 83, 88, 60 Pac. 670; *People v. Cum-*

tings, 113 Cal. 88, 45 Pac. 184; *People v. Neary*, 104 Cal. 373, 37 Pac. 943; *People v. Perry*, 65 Cal. 568, 4 Pac. 572; *People v. Vasquez*, 49 Cal. 560, followed in *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799.

15. *People v. Casey*, 65 Cal. 261, 3 Pac. 874; *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980.

16. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904; *People v. Schoedde*, 126 Cal. 373, 58 Pac. 859.

17. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. Hertz*, 105 Cal. 660, 39 Pac. 32; *People v. Choynski*, 95 Cal. 640, 30 Pac. 791.

ness.¹⁸ The safer way is to recite the language of the witness as taken down by the reporter, or in the judge's notes.¹⁹ While the court may give the substance of the testimony of the witness,²⁰ it is dangerous to undertake to do so, for it is essentially the province of the jury to decide what the substance of the witness' testimony is.¹ But a new trial will not be granted for an inadvertence which could not have influenced the action of the jury improperly.²

Cautionary and Laudatory Instructions.

§ 356. **In General.**—While it is true that all evidence in a criminal case, whatsoever its nature, should be considered with caution or with that deliberation which will insure a just verdict, it is not within the province of trial courts to select a particular species of evidence as the theme for a special caution to the jury, thus disparaging the probative effect thereof.³ Such instructions are addressed entirely to the weight or credence which the jury should attach to the testimony,⁴ and are also objectionable as being argumentative, or as emphasizing certain features of the testimony, thereby implying that the judge was distrustful of it.⁵ But where such instructions tell a

18. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694.

19. *People v. Phillips*, 70 Cal. 61, 68, 11 Pac. 493; *People v. Perry*, 65 Cal. 568, 4 Pac. 572; *People v. Doyell*, 48 Cal. 85.

20. *People v. Phillips*, 70 Cal. 61, 68, 11 Pac. 493.

1. *People v. Gordon*, 88 Cal. 422, 427, 26 Pac. 502.

2. *People v. Doyell*, 48 Cal. 85.

3. *People v. Bojorquez*, 35 Cal. App. 350, 169 Pac. 922; *People v. Kawasaki*, 23 Cal. App. 92, 137 Pac. 287 (where the instruction re-

ferred to the testimony of those testifying to defendant's identity); *People v. Dallen*, 21 Cal. App. 770, 780, 132 Pac. 1064; *People v. Piner*, 11 Cal. App. 542, 554, 105 Pac. 780 (where instruction related to character evidence). See *infra*, §§ 357, 359, as to the rule in reference to the testimony of accomplices; and *infra*, § 359, as to oral admissions.

4. *People v. Dallen*, 21 Cal. App. 770, 780, 132 Pac. 1064 (dying declarations).

5. *People v. Kawasaki*, 23 Cal. App. 92, 137 Pac. 287.

jury to do what they would do in the absence of any instruction upon the subject, they are harmless if given.⁶ However, the objection to an instruction is not avoided if it is directed at a class, and only one witness of such class testified.⁷ In accordance with these rules, an instruction to view with caution the testimony of detectives and police officers may be refused.⁸ Where the testimony is based upon the laws of nature and of the exact sciences and not upon speculation,⁹ it is not reversible error either to instruct the jury to view expert opinion evidence with caution,¹⁰ or to refuse to do so.¹¹

Similar reasons forbid instructions laudatory in character. The objection to such an instruction is that it may cause the jury to give undue or added weight to the testimony of the witness.¹²

§ 357. Testimony of Accomplices.—The code provides that on proper occasion, the jury shall be instructed that the testimony of an accomplice ought to be viewed with distrust.¹³ To give this instruction when an accomplice is called as a witness on behalf of the defendant is error, as its effect is to discredit one of defendant's witnesses and thereby to trench upon his constitutional rights by invading the province of the jury.¹⁴ But it is neither

6. See *infra*, § 359. See, also, *People v. Webster*, 36 Cal. App. 540, 172 Pac. 768, holding a cautionary instruction may well be given in a rape case.

7. *People v. Longland*, 35 Cal. App. Dec. 89, 199 Pac. 546.

8. *People v. Longland*, 35 Cal. App. Dec. 89, 199 Pac. 546; *People v. Rudolph*, 28 Cal. App. 683, 153 Pac. 721; *People v. Kilfoil*, 27 Cal. App. 29, 36, 148 Pac. 812.

9. *People v. Smith*, 106 Cal. 73, 39 Pac. 40.

10. *People v. Barthleman*, 120 Cal. 7, 13, 52 Pac. 112.

11. *People v. Wilkins*, 158 Cal. 530, 111 Pac. 612. See *People v. Buck*, 151 Cal. 667, 673, 91 Pac. 529, holding that the request was covered by other instructions and properly refused on that ground.

12. *People v. Longland*, 35 Cal. App. Dec. 89, 199 Pac. 546.

13. Code Civ. Proc., § 2061, subd. 4; *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201 (holding that an instruction is not erroneous which states that the evidence of an accomplice is to be viewed "with caution and distrust").

14. *People v. Cluff*, 122 Cal. 589,

reversible error to give,¹⁵ or to refuse to give¹⁶ such an instruction in a case in which an accomplice is called as a witness on behalf of the people. At all events, a failure to give the instruction is harmless if there is sufficient evidence, without that of the accomplice, to support the verdict.¹⁷ If this instruction should be given in a case in which the evidence discloses the commission of several crimes, it should be limited to accomplices in the crime charged.¹⁸

§ 358. Evidence of Insanity and Intoxication.—Trial courts frequently instruct juries that while the defense of insanity is to be weighed fairly, fully, and justly, it should be examined with care lest an ingenious counterfeit of such infirmity shall furnish immunity to guilt.¹⁹ While this instruction may well be omitted altogether,²⁰ as the jury may take it as an intimation by the judge of his opinion of the case on trial,¹ it has been so frequently given and approved, that it is now established that it is not prejudicially erroneous.² This instruction

55 Pac. 407; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Hoosier*, 24 Cal. App. 746, 757, 142 Pac. 514.

15. *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

16. *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907 (In bank, Beatty, C. J., dissenting); *People v. Hoosier*, 24 Cal. App. 746, 757, 142 Pac. 514. In some early cases it was held that a refusal to give this instruction was reversible error; *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *People v. Strybe*, 4 Cal. Unrep. 505, 36 Pac. 3.

17. *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874; *People v. Fun-tas*, 41 Cal. App. 408, 182 Pac. 785.

18. *People v. Ward*, 134 Cal. 301, 311, 66 Pac. 372.

19. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073 (holding the instruction to be substantially that which has received the approval of the court); *People v. Pico*, 62 Cal. 50 (giving form of instruction held to be correct); *People v. Dennis*, 39 Cal. 625, 636.

20. *People v. Manoagian*, 141 Cal. 592, 75 Pac. 177; *People v. Ford*, 138 Cal. 140, 70 Pac. 1075; *People v. Methever*, 132 Cal. 326, 64 Pac. 481; *People v. Stein*, 23 Cal. App. 108, 117, 137 Pac. 271.

1. *People v. Guesser*, 142 Cal. 354, 365, 75 Pac. 1093.

2. *People v. Bundy*, 168 Cal. 777, 780, 145 Pac. 537; *People v. Nihell*, 144 Cal. 200, 77 Pac. 916; *People*

applies with equal force to any aberration of the mind that may be relied upon as a defense, and it is not reversible error to give it in any case where such a defense is relied on.³

Intoxication.—An instruction that evidence of drunkenness should be received with great caution is not ground for reversal,⁴ although it would be better, if omitted altogether.⁵

§ 359. Oral Admissions.—The statute provides that upon proper occasions the jury is to be instructed that the evidence of the oral admissions of the defendant ought to be received with caution.⁶ This provision has been held to be unconstitutional, because in violation of the constitutional injunction against charging upon matters of fact.⁷ Consequently an instruction of this kind should not be given.⁸ But where the instruction is so worded that it merely tells the jury to do what they ought to do

v. Suesser, 142 Cal. 354, 365, 75 Pac. 1093; *People v. Manoagian*, 141 Cal. 592, 75 Pac. 177; *People v. Donlan*, 135 Cal. 489, 87 Pac. 761; *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *People v. Mathever*, 132 Cal. 326, 331, 64 Pac. 481; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Allender*, 117 Cal. 81, 48 Pac. 1014; *People v. Kloss*, 115 Cal. 567, 577, 47 Pac. 459; *People v. McCarthy*, 115 Cal. 255, 265, 46 Pac. 1073; *People v. Larrabee*, 115 Cal. 158, 46 Pac. 1073; *People v. Bumberger*, 45 Cal. 650; *People v. Dennis*, 39 Cal. 625, 636; *People v. Stein*, 23 Cal. App. 108, 117, 137 Pac. 271; *People v. Vaughn*, 14 Cal. App. 201, 111 Pac. 620.

3. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916.

4. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581; *People v. Ferris*, 55 Cal. 588. See *People v. Young*, 102 Cal. 411, 36 Pac. 770, which seems to refer to the instruction mentioned in the text, but the opinion is not clear.

5. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916.

6. Code Civ. Proc., § 2061, subd. 4.

7. *People v. Buckley*, 143 Cal. 375, 391, 77 Pac. 169 (Beatty, C. J., dissenting); *People v. Wardrip*, 141 Cal. 229, 233, 74 Pac. 744 (on denying rehearing); *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318.

8. *People v. Wright*, 144 Cal. 161, 77 Pac. 877; *People v. Rodley*, 131 Cal. 240, 258, 63 Pac. 351.

without being told, it is neither reversible error to give⁹ nor to refuse to give it.¹⁰ If any instruction should be given, it should be confined as nearly as possible to the language of the code.¹¹ There is a sufficient distinction between viewing such evidence with caution and with distrust to authorize a refusal to give an instruction in the latter form.¹²

VI. CHARGING THE JURY.

Introductory.

§ 360. **In General.**—Previously we have incidentally touched upon instructions in dealing with the weight and sufficiency of the evidence, misconduct of counsel, and the province of the court and jury.^{12a} Now we take up the general subject of charging the jury, treating of the requisites of instructions, and of the duties of counsel, court

9. *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904; *People v. Herrera*, 32 Cal. App. 610, 163 Pac. 879; *People v. Davenport*, 13 Cal. App. 632, 110 Pac. 318; *People v. Hill*, 1 Cal. App. 414, 82 Pac. 398.

10. *People v. Baber*, 168 Cal. 316, 143 Pac. 317; *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (the main opinion of Beatty, C. J., contrary to the text, was not concurred in by the majority of the court); *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744; *People v. Maljan*, 34 Cal. App. 384, 167 Pac. 547; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649; *People v. Holden*, 13 Cal. App. 353, 109 Pac. 495. See *People v. Sanders*, 114 Cal. 216, 237, 46 Pac. 153, where it was said the instruction should have been given.

11. *People v. Wright*, 144 Cal. 161, 77 Pac. 877; *People v. Buckley*, 143 Cal. 375, 391, 77 Pac. 169 (dis-

tinguishing *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *People v. Strybe*, 4 Cal. Unrep. 505, 36 Pac. 3; *People v. Bonney*, 98 Cal. 278, 33 Pac. 98, as being cases where the proposed instruction was limited to the language of the statute); *People v. Rodley*, 131 Cal. 240, 258, 63 Pac. 351; *People v. Van Horn*, 119 Cal. 323, 332, 51 Pac. 538 (an instruction that admissions should be received with "great caution" may be modified by striking out the word "great"). See *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466, holding that to omit the words "evidence of" and tell the jury that "statements made by a defendant out of court are to be received with caution" is error.

12. *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201.

12a. See *supra*, §§ 260, 261, 321, and 344 to 359, *in cl.*

and jury in regard to requesting, giving and following them.

The Penal Code provides that when the argument of counsel is concluded,

“The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law.”¹³

Section 1127 of the same code provides that

“In charging the jury the court must state to them all matters of law necessary for their information. . . . Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent it must be given; if not, it must be refused.”¹⁴

There were similar provisions in the Criminal Practice Act. The office of instructions is to enlighten the jury as to the law applicable to the case,¹⁵ not to assist them in reaching a conclusion as to the facts.¹⁶ A defendant is entitled to have an instruction or charge upon every point of law material to the case, and necessary for the information of the jury, and to have the law fully, clearly and fairly stated.¹⁷ The court may state the theory of the prosecution and defense.¹⁸ It is its duty to state the law relating to the crime charged,¹⁹ and, when requested, to instruct the jury with reference to every element of defense shown by the evidence.²⁰ The instructions need not, however, cover matters admitted by the defendant while

13. Pen. Code, § 1093, subd. 6 (in part). As to office of instructions in Civil Cases, see TRIAL.

14. *People v. Byrnes*, 30 Cal. 206; *People v. Fox*, 43 Cal. App. 399, 185 Pac. 211.

15. *People v. Bruggy*, 93 Cal. 476, 485, 29 Pac. 26.

16. *People v. Zachary*, 22 Cal. App. 475, 134 Pac. 1005: See *supra*, § 336, province of court and jury.

17. *People v. Dodge*, 30 Cal. 448.

18. *People v. Worden*, 113 Cal. 569, 45 Pac. 844. See *supra*, § 345.

19. See *infra*, § 374.

20. *People v. Williamson*, 6 Cal. App. 336, 92 Pac. 313. See *infra*, § 381.

upon the witness-stand.¹ It must be assumed also that the jury are fair and intelligent men. It is, therefore, unnecessary to instruct them as to obvious and rudimentary matters,² or, at least, a failure or refusal to give such an instruction is harmless.³ The trial judge is bound to instruct the jury on the law itself and not upon its history, object or purpose. He does his duty by saying what the law is without an exposition of its reasons.⁴

Law of sister state.—When the law of a sister state is involved, it is not the duty of the court to tell the jury what the law of that state applicable to the case actually is, because that is a question of fact to be proven like any other fact. But if the testimony in respect thereto is conflicting, he should aid the jury by an analysis of the conflicting theories.⁵

§ 361. Duty of Jury to Follow Instructions.—The general rule that the jury is bound to follow the instructions given by the court is embodied in section 1126 of the Penal Code, which is as follows:

“Although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.”⁶

It is proper to instruct the jury that it is their duty to receive the law as laid down by the court,⁷ notwithstanding they may firmly believe the court is wrong or that the law is or should be otherwise.⁸

1. *People v. Williams*, 32 Cal. 280.

2. *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945; *People v. Hill*, 1 Cal. App. 414, 82 Pac. 398.

3. See *infra*, § 606.

4. *People v. Ramirez*, 56 Cal. 533, 15 Pac. 33; *People v. Piner*, 11 Cal. App. 542, 555, 105 Pac. 780.

5. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78.

6. *People v. Musumeci*, 34 Cal. App. Dec. 546, 197 Pac. 129.

7. *People v. Crane*, 4 Cal. App. 142, 87 Pac. 239.

8. *People v. Worden*, 113 Cal. 569, 45 Pac. 844. See, also, *People v. Botkin*, 9 Cal. App. 244, 256,

Requests for Instructions.

§ 362. **Necessity of Request.**—It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves.⁹ But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them.¹⁰ When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct upon any particular matter deemed essential is not error in the absence of a request for such an instruction.¹¹

If the defendant is dissatisfied with the form of an instruction as given by the court, and the instruction is not erroneous as a matter of law, it is his duty to demand a

98 Pac. 861, where the trial court used this language: "No harm can come from my errors, if I commit any, for a supreme court sits to correct them, and the jury should not assume to exercise the functions of that tribunal."

9. *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Peck*, 43 Cal. App. 638, 185 Pac. 881.

10. *People v. Martin*, 44 Cal. App. 45, 185 Pac. 1003; *People v. Peck*, 43 Cal. App. 638, 185 Pac. 881.

11. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Keyes*, 178 Cal. 794, 175 Pac. 6; *People v. Rogers*, 163 Cal. 476, 126 Pac. 143 (where in a prosecution for murder committed in an attempted robbery, the court failed to define robbery); *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017; *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *People v. Oliveria*, 127 Cal. 377, 59

Pac. 772; *People v. Appleton*, 120 Cal. 250, 52 Pac. 582; *People v. White*, 116 Cal. 17, 47 Pac. 771; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159; *People v. Fice*, 97 Cal. 459, 32 Pac. 531; *People v. McLeon*, 84 Cal. 480, 24 Pac. 32; *People v. Northey*, 77 Cal. 618, 632, 19 Pac. 865, 20 Pac. 129; *People v. Gray*, 66 Cal. 271, 276, 5 Pac. 240; *People v. Geiger*, 49 Cal. 643; *People v. Ah Wee*, 48 Cal. 236; *People v. Williams*, 32 Cal. 280; *People v. Northcott*, 59 Cal. Dec. 415, 31 Cal. App. Dec. 346, 189 Pac. 704, 710; *People v. Martin*, 44 Cal. App. 45, 185 Pac. 1003; *People v. Stirgios*, 23 Cal. App. 48, 136 Pac. 957; *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968; *People v. Lopez*, 21 Cal. App. 188, 131 Pac. 104; *People v. Loomer*, 13 Cal. App. 656, 110 Pac. 466; *People v. White*, 5 Cal. App. 329, 335, 90 Pac. 471. See *infra*, § 520.

more explicit instruction.¹² Accordingly, where a general instruction is given, which is correct as far as it goes, but is merely deficient by reason of its generality, the defendant is bound to request that the charge be made more specific, if he would complain thereof upon appeal.¹³ This rule does not apply, however, where the instruction given is erroneous as a matter of law. In such case the defendant is not bound to correct it at the moment of its commission under penalty of waiving his right to object to it upon appeal.¹⁴

While ordinarily a defendant may not complain of the refusal of an instruction requested by him which is not perfectly correct, the court is not justified in refusing to instruct at all upon the paramount and vital issues in a case, simply because a particular form of instruction asked by counsel may be safely refused.¹⁵

§ 363. Rule Applied.—In accordance with the rule laid down in the next preceding section, a defendant who has not made a request therefor, cannot complain of a failure to give instructions as to the following matters: the presumption of innocence;¹⁶ the necessity for finding the existence of a specific intent;¹⁷ the effect of the intoxication of a defendant;¹⁸ the necessity for proof of the venue as

12. *People v. Marshall*, 120 Cal. 70, 52 Pac. 129; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125.

13. *People v. Weber*, 149 Cal. 325, 347, 86 Pac. 671; *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. Bruggy*, 93 Cal. 476, 485, 29 Pac. 26; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888; *People v. Dollor*, 89 Cal. 513, 26 Pac. 1086; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Byrnes*, 30 Cal. 206; *People v. Evans*, 5 Cal. Unrep. 125, 41 Pac. 444; *People v. Profumo*, 23 Cal. App. 376, 138 Pac.

109; *People v. Loomer*, 13 Cal. App. 656, 110 Pac. 466.

14. *People v. Profumo*, 23 Cal. App. 376, 138 Pac. 109.

15. *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Tapia*, 131 Cal. 647, 654, 63 Pac. 1001.

16. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694.

17. *People v. Shaw*, 36 Cal. App. 441, 444, 172 Pac. 401.

18. *People v. Oliveria*, 127 Cal. 377, 59 Pac. 772; *People v. White*, 5 Cal. App. 329, 335, 90 Pac. 471.

laid;¹⁹ the nature and value of circumstantial evidence;²⁰ the failure of the defendant to testify;¹ the credit to be given the testimony of an accomplice,² or of the defendant;³ the character of the defendant;⁴ the necessity that the guilt of the defendant should be inconsistent with every other rational hypothesis;⁵ and the right to convict of lesser offenses included in the offense charged.⁶ So also unless requested, a defendant cannot urge as error the failure to give an instruction limiting the effect of evidence admissible only for a limited purpose;⁷ or directing the jury to disregard evidence that has been stricken out,⁸ or as to the right of the jury to redetermine

19. *People v. Marks*, 72 Cal. 46, 13 Pac. 149.

20. *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017.

1. *People v. Rogers*, 163 Cal. 476, 484, 126 Pac. 143; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

2. *People v. Tobin*, 39 Cal. App. 76, 179 Pac. 443; *People v. Hoosier*, 24 Cal. App. 746, 757, 142 Pac. 514.

3. *People v. Rodundo*, 44 Cal. 538.

4. *People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *People v. Lopez*, 21 Cal. App. 188, 131 Pac. 104.

5. *People v. Brittan*, 118 Cal. 409, 50 Pac. 664.

6. *People v. Modina*, 146 Cal. 142, 79 Pac. 842; *People v. Clark*, 145 Cal. 727, 79 Pac. 434; *People v. Bailey*, 142 Cal. 434, 76 Pac. 49; *People v. Wilson*, 135 Cal. 331, 67 Pac. 322; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Church*, 116 Cal. 300, 48 Pac. 125; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *People v. Guidice*, 73 Cal. 226, 15 Pac. 44; *People v. Franklin*, 70 Cal.

641, 11 Pac. 797; *People v. Ah Wee*, 48 Cal. 236; *People v. Haun*, 44 Cal. 96, 100; *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506.

7. *People v. Monroe*, 138 Cal. 97, 70 Pac. 1072; *People v. Findley*, 132 Cal. 301, 306, 64 Pac. 472; *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040; *People v. Northey*, 77 Cal. 618, 631, 19 Pac. 865, 20 Pac. 129; *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46; *People v. Germino*, 38 Cal. App. 101, 175 Pac. 489; *People v. Escalera*, 36 Cal. App. 212, 215, 171 Pac. 975; *People v. Collins*, 35 Cal. App. 175, 169 Pac. 410; *People v. Moran*, 25 Cal. App. 472, 144 Pac. 152; *People v. Collins*, 48 Cal. 277; *People v. French (Cal.)*, 7 Pac. 822; *People v. Peck*, 43 Cal. App. 638, 185 Pac. 881; *People v. Collins*, 35 Cal. App. 175, 169 Pac. 410; *People v. Carmean*, 23 Cal. App. 396, 138 Pac. 117; *People v. Lichtenstein*, 22 Cal. App. 592, 609, 135 Pac. 692; *People v. Haydon*, 18 Cal. App. 543, 570, 123 Pac. 1102, 1114; *People v. Castile*, 3 Cal. App. 485, 86 Pac. 745.

8. *People v. McLean*, 84 Cal. 480, 24 Pac. 32.

the question as to the voluntary character of a confession and reject the statement as evidence if they find adversely.⁹ If a defendant wishes a fuller definition of the crime than that given, he must request it.¹⁰ He must also request instructions defining the terms "reasonable doubt,"¹¹ "circumstantial evidence,"¹² "preponderance of evidence,"¹³ and "malice,"¹⁴ or he cannot complain upon appeal.

§ 364. Sufficiency of Request and Time Therefor.—A party desiring that a jury be instructed upon any proposition should submit to the court a specific written instruction embodying it.¹⁵ Independently of rules, a party has a right to submit his instructions at any time before the jury leave the box.¹⁶ But the trial court may, by rule, require a party desiring instructions given to present them to the court in writing before argument begins.¹⁷ Such a rule, when applied to doubtful and controverted questions of law, ought usually to be adhered to.¹⁸ But when the strict observance of the rule would operate to impair and defeat justice, it is within the power and it is the duty of the court to suspend it.¹⁹ For example, such

⁹ *People v. Fowler*, 178 Cal. 657, 662, 174 Pac. 892.

¹⁰ *People v. Appleton*, 120 Cal. 250, 52 Pac. 582; *People v. Christenson*, 85 Cal. 568, 24 Pac. 888; *People v. Castile*, 3 Cal. App. 487, 86 Pac. 746.

¹¹ *People v. Ahern*, 93 Cal. 518, 29 Pac. 49; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Cuin*, 27 Cal. App. 316, 149 Pac. 795.

¹² *People v. Hiltel*, 131 Cal. 577, 63 Pac. 919.

¹³ *People v. Williams*, 184 Cal. 590, 194 Pac. 1019.

¹⁴ *People v. Glaze*, 139 Cal. 154, 161, 72 Pac. 965.

¹⁵ *People v. Germino*, 38 Cal. App. 100, 175 Pac. 489.

¹⁶ *People v. Cook*, 148 Cal. 334, 348, 83 Pac. 43; *People v. Williams*, 32 Cal. 280; *People v. Denomme*, 6 Cal. Unrep. 227, 56 Pac. 98.

¹⁷ *People v. Lang*, 142 Cal. 482, 76 Pac. 232; *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *People v. Sears*, 18 Cal. 635. But see *People v. Williams*, 32 Cal. 280, *Sawyer, J.*, dissenting.

¹⁸ *People v. Demasters*, 105 Cal. 669, 39 Pac. 35.

¹⁹ *People v. Silva*, 121 Cal. 668, 54 Pac. 146; *People v. Williams*, 32 Cal. 280.

a rule will not justify a court in refusing to give a proper instruction upon a point in a case material to the defendant, which has not been given elsewhere,²⁰ or an instruction which the code directs to be given upon a proper occasion,¹ or an instruction respecting the right of a jury to convict of lesser included offenses.² So also if instructions are made necessary by the argument of the prosecuting attorney, the court should either give the instructions of the defendant or make such explanations of its own as will put the law correctly before the jury.³

§ 365. Disposition of Requests.—When an instruction asked by a defendant is correct in principle, pertinent to the case, and expressed in clear and explicit language, it is better practice for the court to give it, for by a refusal a pretext is afforded for an appeal, which otherwise perhaps would not be taken.⁴ This is so even though the result is that the law is stated more than once.⁵ For the same reason, doubtful instructions requested by the prosecution should be refused except where they appear to be absolutely essential to a proper presentation of the case.⁶

Whether instructions are requested by the prosecution or the defense, or are given by the court upon its own motion, they are in all cases considered as the instructions of the court. From this it follows that the order in which

20. *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

1. *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

2. *People v. Demasters*, 105 Cal. 669, 39 Pac. 35.

3. *People v. Sears*, 18 Cal. 635.

4. *People v. Hecker*, 109 Cal. 451, 466, 30 L. R. A. 403, 42 Pac. 307; *People v. Murray*, 41 Cal. 66; *People v. Lachanais*, 32 Cal. 433; *People v. Williams*, 32 Cal. 280; *People v. Dodge*, 30 Cal. 448; *People v. Strong*, 30 Cal. 151; *People v. King*,

27 Cal. 507, 515, 87 Am. Dec. 95; *People v. Williams*, 17 Cal. 142; *People v. Romero*, 17 Cal. App. 680, 121 Pac. 698; *People v. Emmons*, 13 Cal. App. 487, 495, 110 Pac. 151; *People v. Price*, 9 Cal. App. 218, 98 Pac. 547; *People v. Hemple*, 4 Cal. App. 120, 129, 87 Pac. 227.

5. *People v. Lachanais*, 32 Cal. 433; *People v. Ramirez*, 13 Cal. 172.

6. *People v. Barthleman*, 120 Cal. 7, 14, 52 Pac. 112.

instructions are given is immaterial.⁷ It is not necessary to inform the jurors which party requested particular instructions read to them;⁸ but it is not prejudicial error to do so where they are instructed that they are bound to accept every instruction as the law of the case.⁹ Since under the code a jury can take into the jury-room only those instructions which have been given, and can have no knowledge of those that have been refused, it is not necessary for a court, when refusing certain instructions asked by the defendant because covered by other instructions, to state to the jury the reasons for the refusal.¹⁰ Formerly the rule was otherwise,¹¹ but a noncompliance therewith was regarded as immaterial error.¹²

§ 366. Refusal of Requests Covered by Other Instructions.—The court is not required to state the law to the jury more than once, but may, as a general rule, refuse requested instructions which are fully covered by other instructions.¹³ A defendant in any given case is not en-

7. *People v. Holt*, 22 Cal. App. 697, 136 Pac. 501.

8. *People v. Bundy*, 168 Cal. 777, 145 Pac. 537; *People v. Wilder*, 134 Cal. 182, 66 Pac. 228.

9. *People v. Wilder*, 134 Cal. 182, 66 Pac. 228; *People v. Musumeci*, 34 Cal. App. Dec. 546, 197 Pac. 129.

10. *People v. Barthleman*, 120 Cal. 7, 11, 52 Pac. 112; *People v. Vermillion*, 30 Cal. App. 417, 158 Pac. 504; *People v. Maupins*, 30 Cal. App. 392, 158 Pac. 502.

11. *People v. Hobson*, 17 Cal. 424; *People v. Williams*, 17 Cal. 142; *People v. Ramirez*, 13 Cal. 172; *People v. Hurley*, 8 Cal. 390; *People v. Jones*, 1 Cal. Unrep. 545 (presuming on appeal that this was done); *People v. Lockart*, 1 Cal. Unrep. 219.

12. *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73; *People v. Lockhart*, 1 Cal. Unrep. 219.

13. *People v. Loomis*, 170 Cal. 347, 149 Pac. 581; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *People v. Sing Yow*, 145 Cal. 1, 10, 78 Pac. 235; *People v. Glaze*, 139 Cal. 154, 164, 72 Pac. 965; *People v. Smith*, 151 Cal. 619, 91 Pac. 511; *People v. Eldridge*, 147 Cal. 782, 82 Pac. 442; *People v. Ross*, 134 Cal. 256, 66 Pac. 229; *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *People v. Rodley*, 131 Cal. 240, 258, 63 Pac. 351; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *People v. Bungle*, 123 Cal. 303, 55 Pac. 998; *People v. Barthleman*, 120 Cal. 7, 10, 52 Pac. 112; *People*

titled to have his own particular phrasing of the law adopted by the court and given to the jury. It is sufficient if the substance of the law applicable to his case is set forth by the court correctly in its instructions.¹⁴ In this connection it has been said: "When a proposition of law is once correctly and clearly stated, it is not error to

v. Elliott, 119 Cal. 593, 51 Pac. 955; People v. Durrant, 116 Cal. 179, 222, 48 Pac. 75; People v. Schmitt, 106 Cal. 48, 39 Pac. 204; People v. Roney, 100 Cal. 375, 34 Pac. 862; People v. Douglass, 100 Cal. 1, 34 Pac. 490; People v. Walters, 98 Cal. 138, 32 Pac. 864; People v. Cowgill, 93 Cal. 596, 29 Pac. 228; People v. Madden, 76 Cal. 521, 18 Pac. 402; People v. McCoy, 71 Cal. 395, 12 Pac. 272; People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Hong Ah Duck, 61 Cal. 387; People v. Cadd, 60 Cal. 640; People v. De Cleer, 60 Cal. 382; People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Ah Chung, 54 Cal. 398; People v. Varnum, 53 Cal. 630; People v. Johnson, 47 Cal. 122; People v. Strong, 30 Cal. 151; People v. Kelly, 28 Cal. 423; People v. King, 27 Cal. 507, 514, 87 Am. Dec. 95; People v. Chin Yuen, 7 Cal. Unrep. 188, 77 Pac. 954 (per Angellotti, J., and Shaw, J.); People v. Feliz, 6 Cal. Unrep. 939, 69 Pac. 220; People v. Collins, 36 Cal. App. Dec. 386, 202 Pac. 344; People v. Casanova, 36 Cal. App. Dec. 331, 202 Pac. 45; People v. Musumeci, 34 Cal. App. Dec. 546, 197 Pac. 129; People v. Tinnen, 60 Cal. Dec. 355, 32 Cal. App. Dec. 1067, 192 Pac. 557; People v. Fuski, 60 Cal. Dec. 349, 32 Cal. App. Dec. 1038, 192 Pac. 552, 555; People v. Sing, 42 Cal. App. 385, 183 Pac. 865; People v. Bernal, 40 Cal. App. 358,

180 Pac. 825; People v. Epperson, 38 Cal. App. 486, 176 Pac. 702; People v. Maupins, 30 Cal. App. 392, 158 Pac. 502; People v. Chober, 29 Cal. App. 627, 157 Pac. 533; People v. Cornell, 29 Cal. App. 430, 440, 155 Pac. 1026; People v. Lim Foon, 29 Cal. App. 270, 276, 155 Pac. 477; People v. Kilfoil, 27 Cal. App. 29, 148 Pac. 812; People v. Horn, 25 Cal. App. 583, 144 Pac. 641; People v. Williams, 24 Cal. App. 646, 142 Pac. 124; People v. Iden, 24 Cal. App. 626, 636, 142 Pac. 117; People v. Metzler, 21 Cal. 80, 130 Pac. 1192; People v. Romero, 17 Cal. App. 680, 121 Pac. 698; People v. Lewis, 17 Cal. App. 621, 120 Pac. 1067; People v. Davenport, 17 Cal. App. 557, 120 Pac. 451; People v. Crosby, 17 Cal. App. 518, 120 Pac. 441; People v. Delucchi, 17 Cal. App. 96, 118 Pac. 935; People v. Piercy, 16 Cal. App. 13, 116 Pac. 322; People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792; People v. Stevens, 15 Cal. App. 294, 114 Pac. 800; People v. Scott, 13 Cal. App. 301, 109 Pac. 498; People v. Ross, 11 Cal. App. 268, 104 Pac. 709; People v. Yun Kee, 8 Cal. App. 82, 96 Pac. 95; People v. King, 4 Cal. App. 213, 87 Pac. 400; People v. Fernandez, 3 Cal. App. 689, 86 Pac. 899. But see People v. Ramirez, 13 Cal. 172.

14. People v. MacPhee, 26 Cal. App. 218, 146 Pac. 522. See *infra*, § 367.

refuse its repetition in another form, unless the other form is necessary to a proper conception of the principle as applicable to some phase of the case not covered by other instructions."¹⁵ The repetition of instructions in varying language tends to give undue emphasis to the point to which they may relate and may confuse the jury in their consideration of the evidence. Hence it is to be avoided as far as possible.¹⁶ The mere fact, however, that an instruction was given does not authorize the refusal of another, if that given was brief, general, and colorless in comparison with that asked.¹⁷

§ 367. Modification and Refusal of Requests.—When an instruction as requested is not a correct statement of the law in whole or in part, the court is not required to separate the sound principles from those unsound, but may refuse it entirely.¹⁸ So also a court may refuse an instruction containing clerical misprisions.¹⁹ But if the court chooses to do so, it may modify the instruction, and the defendant cannot complain if the instruction as modified correctly states the law.²⁰ So also although a re-

15. *People v. Shimonakee*, 16 Cal. App. 117, 126, 116 Pac. 327 (per Chipman, J.).

16. *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 59 Cal. Dec. 611, 190 Pac. 656 (by the supreme court denying a hearing).

17. *People v. Cook*, 148 Cal. 334, 347, 83 Pac. 43.

18. *People v. Davis*, 135 Cal. 162, 67 Pac. 59; *People v. Doane*, 77 Cal. 560, 20 Pac. 84 (rule applied to incorrect request as to defense of claim of title in embezzlement case); *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *People v. Hurtado*, 63 Cal. 288, 296; *People v. Wagner*, 29 Cal. App. 363, 155 Pac. 649; *People v. Metzler*, 21 Cal. App. 80, 130 Pac. 1192; *People v. Wong*

Sang Lung, 3 Cal. App. 221, 84 Pac. 843.

19. *People v. Cipolla*, 155 Cal. 224, 100 Pac. 252.

20. *People v. Weber*, 149 Cal. 325, 346, 86 Pac. 671 (where certain portions of an instruction were stricken out as argumentative); *People v. Shears*, 133 Cal. 154, 161, 65 Pac. 295; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *People v. Wright*, 93 Cal. 564, 29 Pac. 240; *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *People v. Velarde*, 59 Cal. 357; *People v. Dodge*, 30 Cal. 448 (citing *Boyce v. California Stage Co.*, 25 Cal. 460); *People v. Sherman*, 3 Cal. Unrep. 851, 32 Pac. 879; *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843.

quest is a correct statement of a proposition of law, the court may modify it if in its opinion it is defective in substance or expression.¹ While it is the duty and province of the trial judge to expound the law, it is his right and privilege, in doing so, to use such language as in his judgment is best calculated to explain the same and render it clear to the comprehension of the jury. Counsel may submit instructions to the judge, but beyond this they have no legal right to dictate to him either the form or substance.² The court may also modify a requested instruction by adding a statement of a further principle pertinent to the case and germane to the point of the instruction asked and given,³ or by striking out statements covered by other instructions.⁴ But when instructions properly requested by the defendant are legal as applied to his evidence, it is error to modify them by introducing into them foreign matter in relation to his own credibility as a witness,⁵ or by coupling them with a sentence or statement not pertinent to the issue or the evidence, although in the abstract containing a correct statement of the law.⁶ It is common practice to emphasize facts stated in an instruction with some such concluding formula, as, if the jury find so and so, they should acquit the defendant, etc. While it is unwise to strike out the concluding formula, it may not be error to do so

1. *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Strange*, 61 Cal. 496; *People v. Dodge*, 30 Cal. 448; *People v. Fuski*, 60 Cal. Dec. 349, 32 Cal. App. Dec. 1038, 192 Pac. 552; *People v. Cox*, 29 Cal. App. 419, 155 Pac. 1010. See *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681, holding that a defendant cannot complain of mere verbal changes in an instruction.

2. *People v. Dodge*, 30 Cal. 448 (holding that the views expressed

in *Boyce v. California Stage Co.*, 25 Cal. 460, apply to criminal as well as civil cases).

3. *People v. Davis*, 47 Cal. 93; *People v. Dodge*, 30 Cal. 448; *People v. Williams*, 32 Cal. 280.

4. *People v. Murnahan*, 32 Cal. App. 211, 162 Pac. 422.

5. *People v. Chadwick*, 143 Cal. 116, 127, 76 Pac. 884.

6. *People v. Emmons*, 13 Cal. App. 487, 495, 110 Pac. 151.

in particular cases, where the instruction as given is complete.⁷

§ 368. Signing and Marking.—Section 1127 of the Penal Code provides in part that

“Upon each charge presented and given or refused, the court must indorse and sign its decision. If part be given and part refused, the court must distinguish, showing by the indorsement what part of the charge was given and what part refused.”⁸

It is also provided in section 1176 of the same code that

“The judge must make and sign an indorsement upon such instructions, showing the action of the court thereon.”

These statutes do not apply to a charge of the court given of its own motion,⁹ but the reporter's transcript thereof must be certified by the trial judge as provided in section 1176 if a review thereof upon appeal is sought.¹⁰ The word “modified” does not necessarily import that a part of a request was given and a part refused within the meaning of the code. If the court modifies an instruction by adding something it is sufficient for him to indorse it “Given as modified.”¹¹ It is a sufficient signing of the indorsement where a charge requested consists of a number of instructions embodied in one instrument and a part is indorsed “given” together with the signature of the judge, and another part is indorsed “stricken out by

7. *People v. Weber*, 149 Cal. 325, 345, 86 Pac. 671; *People v. Hecker*, 109 Cal. 451, 466, 30 L. R. A. 403, 42 Pac. 307; *People v. Musumeci*, 34 Cal. App. Dec. 546, 197 Pac. 129.

8. *People v. Casselman*, 10 Cal. App. 234, 240, 101 Pac. 693. See the Criminal Practice Act, § 401, for a similar provision; and see *People v. Lockwood*, 6 Cal. 205, for

the rule under the Criminal Practice Act.

9. *People v. Samsels*, 66 Cal. 99, 4 Pac. 1061. But see *People v. Vital*, 4 Cal. Unrep. 320, 34 Pac. 617.

10. *People v. January*, 77 Cal. 179, 19 Pac. 258. See *infra*, § 537.

11. *People v. Owens*, 123 Cal. 482, 489, 56 Pac. 251.

court" without his signature.¹² If the judge draws pencil marks through portions of an instruction, and later decides to give it as requested and directs the jury not to consider the pencil marks, the defendant is not prejudiced if the instruction is legible and intelligible.¹³ Whether another judge can be compelled to indorse the charge or certify the report made by the reporter is an open question.¹⁴

Requisites Generally.

§ 369. **In General.**—It is the duty of the court so to formulate its instructions as to avoid any danger of the law being misunderstood by the jury.¹⁵ They should be couched in clear and unequivocal terms,¹⁶ and should not be ambiguous, unintelligible, confusing,¹⁷ conflicting or contradictory,¹⁸ or otherwise misleading. An instruction calculated to confuse or mislead the jury may be refused even though it may not be technically erroneous.¹⁹ A judge's charge to the jury in a criminal case should be a plain statement of the law bearing upon the facts of the case, indicating no opinion of the court as to any fact in issue. In other words, it should not be argumentative in character.²⁰ Neither should it give undue prominence to cer-

12. *People v. Casselman*, 10 Cal. App. 234, 240, 101 Pac. 693.

13. *People v. Shears*, 133 Cal. 154, 65 Pac. 295.

14. See *Walker v. Superior Court*, 139 Cal. 108, 72 Pac. 829 (per opinions of Angellotti, J., Shaw, J., and Beatty, C. J.)

15. *People v. Glover*, 141 Cal. 233, 74 Pac. 745.

16. *People v. Messersmith*, 61 Cal. 246.

17. *People v. Shears*, 133 Cal. 154, 159, 65 Pac. 295; *People v. Vereneseneckockockhoff*, 129 Cal. 497, 507, 58 Pac. 156, 62 Pac. 111;

People v. Jones, 31 Cal. 565, 575; *People v. Maxwell*, 24 Cal. 14; *People v. Rippe*, 32 Cal. App. 514, 163 Pac. 506; *People v. James*, 5 Cal. App. 427, 90 Pac. 561.

18. *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *People v. White*, 5 Cal. App. 329, 90 Pac. 471. See *infra*, § 608.

19. *People v. Hartwell*, 39 Cal. App. 24, 177 Pac. 885.

20. *People v. Hatch*, 163 Cal. 368, 382, 125 Pac. 907; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067 (an instruction that the doubt which acquits must be a reasonable doubt in the sense explained in the

tain issues.¹ But the mere giving of an illustration which makes an instruction more lucid and easier of comprehension does not necessarily render the instruction objectionable as being argumentative.² The lack of grammatical accuracy in instructions is not reversible error if the instruction as a whole is not misleading.³

Trial courts have been frequently warned against the danger of lengthy, complicated and ill-considered instructions in criminal cases, as they are not only calculated to confuse rather than enlighten the jury, but also furnish matter upon which an appeal may be founded.⁴

§ 370. Following Approved Forms—Reading Statutes, Decisions and Pleadings.—In giving instructions it is always safer and, therefore, a better practice, to adhere to forms of expression that have had the direct sanction of the appellate courts.⁵ Where the form of an instruction

instructions and no other is not objectionable as argumentative); *People v. Stanton*, 106 Cal. 139, 39 Pac. 525; *People v. Choynski*, 95 Cal. 640, 30 Pac. 791; *People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *People v. Ardell*, 6 Cal. Unrep. 827, 66 Pac. 970; *People v. Musumeci*, 34 Cal. App. Dec. 546, 197 Pac. 129; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825; *People v. Lopez*, 33 Cal. App. 530, 165 Pac. 722; *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734; *People v. Horn*, 25 Cal. App. 583, 144 Pac. 641; *People v. Cowley*, 7 Cal. App. 501, 94 Pac. 866.

1. An instruction relating to a specific fact upon which the evidence is vague and unsatisfactory and tending to magnify its importance in the minds of the jury may be refused; *People v. Loomis*, 170 Cal. 347, 149 Pac. 581. See *supra*, § 349.

2. *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

3. *People v. Gibson*, 106 Cal. 458, 469, 39 Pac. 864; *People v. Alsemi*, 85 Cal. 434, 24 Pac. 810; *People v. Lim Foon*, 29 Cal. App. 270, 275, 155 Pac. 477.

4. *People v. Mullings*, 83 Cal. 138, 147, 23 Pac. 229; *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People v. Byrnes*, 30 Cal. 206; *People v. Ah Fung*, 17 Cal. 377; *People v. Gibson*, 17 Cal. 283; *People v. Lee*, 2 Cal. Unrep. 569, 8 Pac. 685; *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688.

5. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Evans*, 124 Cal. 206, 56 Pac. 1024; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Ah Gee Yung*, 86 Cal. 144, 24 Pac. 860 (per McFarland, J., specially concurring); *People v. Crawford*, 24 Cal. App. 396, 406, 141 Pac. 824.

is prescribed by the code, and the occasion is proper, as general rule, it cannot be given in better form than is there laid down.⁶ Even though an instruction cannot be commended as a full and clear exposition of the law on that point, still it cannot be said to be error to conform to the language of the code and omit what the code itself omits.⁷ It is not always proper to take excerpts from reported cases and read them to the jury without qualification, as such excerpts, while unquestionably correct as abstract propositions, may invade the province of the jury as applied to a particular case.⁸ The mere fact that the court declares its instruction is taken from a decision of an appellate court does not cure the defect, when it is also declared that such decision would be adopted as a part of the court's instructions.⁹ The method of stating a rule as having been held in a cited decision of a court of another state, while not commendable, is not erroneous if there is no error in the rule as stated.¹⁰ So also it is not commendable practice to read from an opinion of a case an argument upon a proposition and then tell the jury the extract is not the law of California. The court should instruct only affirmatively as to what the law is, not what it is not.¹¹

It is not error for the court to reread the information to the jury in the opening of its instructions.¹²

§ 371. Applicability to Facts.—The instructions given to a jury must always be adapted to the evidence and circumstances of the case on trial,¹³ otherwise they are mere

6. *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405; *People v. Ruef*, 14 Cal. App. 576, 613, 114 Pac. 48, 54. See *infra*, § 374.

7. *People v. Dobbins*, 138 Cal. 694, 698, 72 Pac. 342.

8. *People v. McNabb*, 79 Cal. 419, 21 Pac. 843; *People v. Goodrum*, 31 Cal. App. 430, 160 Pac. 690.

9. *People v. Goodrum*, 31 Cal. App. 430, 160 Pac. 690.

10. *People v. Holmes*, 118 Cal. 444, 459, 50 Pac. 675.

11. *People v. Paulsell*, 115 Cal. 6, 13, 46 Pac. 734.

12. *People v. Maughs*, 149 Cal. 253, 264, 86 Pac. 187.

13. *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; *People v. Man-*

legal abstractions calculated to mislead the jury by diverting their minds from the true issue before them for trial. No instruction should be given which is not predicated upon some theory logically deducible from at least some portion of the testimony.¹⁴ The theories advanced

ning, 146 Cal. 100, 79 Pac. 856; *People v. Morine*, 138 Cal. 626, 631, 72 Pac. 166; *People v. Huntington*, 138 Cal. 261, 264, 70 Pac. 284; *People v. Ross*, 134 Cal. 256, 66 Pac. 229; *People v. Hartman*, 130 Cal. 487, 62 Pac. 823; *People v. Gleason*, 122 Cal. 370, 55 Pac. 123; *People v. Church*, 116 Cal. 300, 303, 48 Pac. 125; *People v. Thompson*, 115 Cal. 160, 166, 46 Pac. 912; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *People v. Devine*, 95 Cal. 227, 30 Pac. 378; *People v. Buelna*, 81 Cal. 135, 140, 22 Pac. 396; *People v. Bourke*, 66 Cal. 455, 6 Pac. 89; *People v. Gilbert*, 60 Cal. 108; *People v. Bird*, 60 Cal. 7; *People v. Smith*, 57 Cal. 130; *People v. Atherton*, 51 Cal. 495; *People v. Murphy*, 47 Cal. 103; *People v. Davis*, 47 Cal. 93; *People v. Williams*, 43 Cal. 344, 351; *People v. Best*, 39 Cal. 690; *People v. Williams*, 32 Cal. 280; *People v. Byrnes*, 30 Cal. 207; *People v. Juarez*, 28 Cal. 380; *People v. Sanchez*, 24 Cal. 17, 28; *People v. Roberts*, 6 Cal. 214; *People v. Honshell*, 10 Cal. 83, 87; *People v. Hurley*, 8 Cal. 390; *People v. Roberts*, 6 Cal. 214; *People v. McCauley*, 1 Cal. 379, 385; *People v. Ardell*, 6 Cal. Unrep. 827, 66 Pac. 970; *People v. Matthews*, 6 Cal. Unrep. 341, 58

Pac. 371; *People v. Reed*, 5 Cal. Unrep. 957, 52 Pac. 835; *People v. Van Riper*, 1 Cal. Unrep. 352; *People v. Northcott*, 59 Cal. Dec. 415, 31 Cal. App. Dec. 346, 189 Pac. 704; *People v. William Yee*, 37 Cal. App. 579, 174 Pac. 343; *People v. Waugh*, 30 Cal. App. 402, 158 Pac. 336; *People v. Kelley*, 24 Cal. App. 54, 62, 140 Pac. 302; *People v. Whitlow*, 24 Cal. App. 1, 8, 139 Pac. 826; *People v. Carroll*, 20 Cal. App. 41, 128 Pac. 4; *People v. Buef*, 14 Cal. App. 576, 611, 114 Pac. 48, 54 (where the trial court read some thirty-odd sections of the codes, as to the rules of evidence, and the appellate court said that it might as well have read the first volume of Greenleaf on Evidence); *People v. Emmons*, 7 Cal. App. 685, 699, 95 Pac. 1032; *People v. White*, 5 Cal. App. 329, 90 Pac. 471; *People v. Elster*, 2 Cal. Unrep. 315, 3 Pac. 884; *People v. Clifton*, 61 Cal. Dec. 760, 198 Pac. 1065; *People v. Ashland*, 20 Cal. App. 168, 178, 128 Pac. 798; *People v. Owens*, 3 Cal. App. 750, 86 Pac. 980 (holding that an instruction that a specific intent is not proved by proof of a general felonious intent may be refused if there is no evidence as to the latter intent).

14. *People v. Hatch*, 163 Cal. 368, 382, 125 Pac. 907; *People v. Atherton*, 51 Cal. 495; *People v. Sanchez*, 24 Cal. 17, 27.

by the parties are of no moment in this connection, except as they are supported by substantial evidence.¹⁵

The character of the instructions is not to be determined alone by the defendant's testimony, or, for that matter, by the testimony of any one witness. It is elementary that the court may instruct a jury upon any material question upon which there is any evidence deserving of any consideration whatever.¹⁶ The evidence need not be direct and positive in character,¹⁷ and the fact that it is not of a character to inspire belief does not authorize the refusal of an instruction based thereupon, as this is a matter within the exclusive province of the jurors.¹⁸ It has been held that, however incredible the testimony of a defendant may be, he is undoubtedly entitled to an instruction based upon the hypothesis that it is entirely true.¹⁹

§ 372. Hypothetical Instructions.—It is allowable for a court to give a hypothetical instruction to the jury, provided their province be not invaded.²⁰ Indeed, it has been said that the court should instruct the jury in this form as a general rule, as the danger of assuming facts is thereby avoided.¹ Such an instruction does not direct the jury how to find the facts, but directs them as to the conclusion that should be drawn if they find certain facts stated to be true.² Each party may prepare instructions assuming any reasonable hypothesis in relation to the

15. *People v. Wright*, 167 Cal. 1, 138 Pac. 349; *People v. Byrnes*, 30 Cal. 207.

16. *People v. Quimby*, 6 Cal. App. 482, 92 Pac. 493.

17. *People v. Wong Hing*, 176 Cal. 699, 705, 169 Pac. 357; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 63 ("It is sufficient if the fact may reasonably be inferred from circumstances proved"); *People v. Billings*, 34 Cal. App. 549, 168 Pac. 196.

18. *People v. Conness*, 150 Cal. 116, 120, 88 Pac. 821.

19. *People v. Keefer*, 65 Cal. 232, 3 Pac. 818; *People v. Williamson*, 6 Cal. App. 336, 92 Pac. 313.

20. *People v. Lanagan*, 81 Cal. 142, 22 Pac. 482; *People v. Westlake*, 62 Cal. 303.

1. *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505. See *supra*, § 351.

2. *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

facts, and ask the court to declare the law applicable to it, and it is error to refuse such instruction merely because the case supposed does not include some other equally rational hypothesis.³ Obviously, the hypothesis assumed as the basis of such an instruction should find support in the evidence adduced at the trial.⁴ If the only testimony relating to the hypothesis negatives the supposed facts on which it is based, instruction may properly be refused.⁵ It is not commendable practice to give long and obscure instructions including large portions of the evidence, and embracing the theory of one side.⁶ When hypothetical instructions are given, the court may in general terms warn the jury that they are not to consider that the court in giving them assumes the existence or nonexistence of any fact therein stated. But it is unjust to apply such directions and warning only to instructions asked by the defendant.⁷

§ 373. Written and Oral Instructions.—To avoid uncertainty as to the instructions given the jury it was required by the Criminal Practice Act that the charge given should be in writing, except when the parties mutually consented that it be oral.⁸ This continued to be the rule until 1874

3. *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403, 42 Pac. 307; *People v. Taylor*, 36 Cal. 255, 267.

4. *People v. Trebilcox*, 149 Cal. 307, 86 Pac. 684; *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *People v. Bird*, 60 Cal. 7; *People v. Ather-ton*, 51 Cal. 495. See *supra*, § 371.

5. *People v. Ward*, 134 Cal. 301, 309, 66 Pac. 372.

6. *People v. Dixon*, 94 Cal. 255, 29 Pac. 504.

7. *People v. Chadwick*, 143 Cal. 116, 126, 76 Pac. 884.

8. *People v. Bumberger*, 45 Cal. 650; *People v. Max*, 45 Cal. 254; *People v. Prospero*, 44 Cal. 186;

People v. Kearney, 43 Cal. 383; *People v. Sanford*, 43 Cal. 29, 35; *People v. Trim*, 37 Cal. 274; *People v. Chares*, 26 Cal. 78; *People v. Woppner*, 14 Cal. 437; *People v. Ah Fong*, 12 Cal. 346, 425; *People v. Demint*, 8 Cal. 423; *People v. Payne*, 8 Cal. 341 (holding it error to give a verbal qualification to a written instruction); *People v. Beeler*, 6 Cal. 246; *People v. Silva*, 1 Cal. Unrep. 283; *People v. O'Hara*, 1 Cal. Unrep. 71.

The consent of the party could not be inferred from his failure to object to the giving of an oral charge. *People v. Prospero*, 44 Cal.

when section 1093 of the Penal Code was amended to provide as follows:

"If the charge be not given in writing, it must be taken down by the phonographic reporter."⁹

The law was further changed in 1897, when section 1127 of the same code was amended. This section, so far as pertinent to this discussion, provides that

"All instructions given (except such as might incidentally be given during the admission of evidence) shall be in writing, unless both parties request the giving of an oral instruction, or consent thereto, and when so given orally, all instructions must be taken down by the phonographic reporter."¹⁰

These provisions are mandatory.¹¹ But inasmuch as writing includes printing,¹² it is not error for the court to read certain sections of the Penal Code applicable to the case which are not reduced to writing or taken down by the reporter. Such reduction to writing would not render the charge of the court any more certain than it already is.¹³ The sections read should be identified with certainty, however.¹⁴ If an oral instruction is given, the court may correct the error, by withdrawing it, reducing it to writing and reading it to the jury as written.¹⁵ But the error cannot be cured by the judge afterwards requiring the reporter to take down the charge according to his recollection as to its contents. Such practice, if allowed, would introduce the very element of uncertainty which it is the purpose of the statute to prevent.¹⁶

186; *People v. Chares*, 26 Cal. 78;
People v. O'Hara, 1 Cal. Unrep. 71.

9. Pen. Code, § 1093, subd. 6;
People v. Curtis, 76 Cal. 57, 17
Pac. 941; *People v. Carrillo*, 70
Cal. 643, 11 Pac. 840; *People v.*
Bourke, 66 Cal. 455, 6 Pac. 89.

10. See *People v. Lang*, 142 Cal.
482, 76 Pac. 232, where it was held
that the record showed consent to
oral instructions.

11. *People v. Hersey*, 53 Cal. 574.
12. Pen. Code, § 7.

13. *People v. Lewis*, 64 Cal. 401,
1 Pac. 490; *People v. Brown*, 59
Cal. 345, 354; *People v. Mortier*, 58
Cal. 262 (decision by an equally
divided court).

14. *People v. Lewis*, 64 Cal. 401,
1 Pac. 490.

15. *People v. Garcia*, 25 Cal. 531.
16. *People v. Hersey*, 53 Cal. 574.

The requirement that instructions be in or reduced to writing applies both to the original charge, and to further instructions given after the jury had retired for deliberation.¹⁷ It does not, however, apply to mere directions as to the form of the verdict.¹⁸

Particular Instructions.

§ 374. Nature and Elements of Offense—Definition of Terms.—It is the duty of the court to instruct the jury as to what crime the defendant is charged to have committed and to state the law in regard thereto,¹⁹ and also, in regard to any included offense which the evidence tends to prove.²⁰ In defining the crime, the court must not ignore any essential element.¹ Ordinarily, it is best to give an instruction in the language of the statute defining the crime, although there may be exceptional cases in which such an instruction would be inapplicable or misleading.² It is neither error to read³ nor to omit⁴ por-

17. *People v. Hersey*, 53 Cal. 574; *People v. Woppner*, 14 Cal. 437.

18. *People v. Jackson*, 57 Cal. 316; *People v. Bonney*, 19 Cal. 426, 446 (where the court directed the jury to find the degree of crime); *People v. Buelna*, 1 Cal. Unrep. 32.

19. *People v. Chaves*, 122 Cal. 134, 141, 54 Pac. 596; *People v. Brennan*, 121 Cal. 495, 53 Pac. 1098.

20. See *infra*, § 409.

1. *People v. Cheong Foon Ark*, 61 Cal. 527 (grand larceny); *People v. Devine*, 59 Cal. 630 (assault to commit murder); *People v. Jenkins*, 16 Cal. 431 (burglary); *People v. Scott*, 22 Cal. App. 54, 62, 133 Pac. 496. See *People v. Oates*, 142 Cal. 12, 75 Pac. 337; and *People v. Price*, 26 Cal. App. 544, 147 Pac. 591, holding definition of "attempt" to be correct.

2. *People v. Treschenko*, 159 Cal. 456, 114 Pac. 578; *People v. Maughs*, 149 Cal. 253, 262, 86 Pac. 187; *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Young*, 65 Cal. 225, 3 Pac. 813; *People v. Cota*, 32 Cal. App. Dec. 43, 190 Pac. 473; *People v. Young*, 44 Cal. App. 279, 186 Pac. 383; *People v. Morrell*, 28 Cal. App. 729, 153 Pac. 977; *People v. Holt*, 22 Cal. App. 697, 136 Pac. 501; *People v. Bernard*, 21 Cal. App. 56, 130 Pac. 1063; *People v. Fortch*, 13 Cal. App. 770, 110 Pac. 823; *People v. White*, 5 Cal. App. 329, 335, 90 Pac. 471; *People v. Crane*, 4 Cal. App. 142, 87 Pac. 239.

3. *People v. Klee*, 6 Cal. Unrep. 957, 69 Pac. 696; *People v. Bernard*, 21 Cal. App. 56, 130 Pac. 1063.

4. *People v. Roberts*, 1 Cal. App. 447, 82 Pac. 624.

tions of the code section not pertinent to the charge made in the indictment or information.

Definition of terms.—The court should define legal and technical terms used in its instructions,⁵ but need not define commonplace words, especially in the absence of a request therefor.⁶ It is not necessary, however, to define terms immediately in the connection in which they are used. They may be defined either previously or subsequently.⁷

§ 375. Time of Commission of Offense.—In certain cases an instruction that the jury must convict if they find that the defendant committed the crime at any time within the period prescribed by the statute of limitations, is proper.⁸ But this rule does not apply when evidence is introduced to prove two or more separate and distinct offenses, the proof of any one of which would support the charge. The effect of such an instruction in the latter

5. *People v. Byrnes*, 30 Cal. 206 (The word "unlawfully" in an instruction that proof must be made that the killing "was unlawfully done by the prisoner" should be defined). See *People v. Frey*, 165 Cal. 140, 131 Pac. 127 (definition of "corpus delicti" held incorrect); *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457 (holding that the word "willfully" was properly defined); *People v. Van Deleer*, 53 Cal. 147 (definition of "poison" held incomplete); and *People v. Daniels*, 4 Cal. Unrep. 248, 34 Pac. 233 (holding definition of "malice" to be correct). See *infra*, § 390 (definition of "accomplish").

6. *People v. Wong Hing*, 176 Cal. 699, 169 Pac. 357 (as to meaning of "aiding and abetting"); *People v. Hirsch*, 21 Cal. App. 737, 132 Pac. 1062 (as to the words "procure" and "place" as used in the

act against pandering). See *supra*, § 363, and *infra*, § 398, as to "reasonable doubt"; and *supra*, § 363, as to "preponderance of evidence".

7. *People v. Byrnes*, 30 Cal. 206.

8. *People v. Morrison*, 36 Cal. App. Dec. 367, 202 Pac. 348 (holding that the instruction was proper in a prosecution for failure to provide for a minor child); *People v. Reynolds*, 32 Cal. App. Dec. 992, 192 Pac. 343 (rape of child under age of consent); *People v. Cruse*, 24 Cal. App. 497, 141 Pac. 936 (contributing to the delinquency of a female); *People v. Carmean*, 23 Cal. App. 396, 138 Pac. 117 (rape of child under the age of consent). See *People v. Goodwin*, 132 Cal. 368, 64 Pac. 561, holding the refusal of an instruction requiring time to be proved as alleged was proper.

case is to authorize a verdict of guilty, although no two jurors are convinced of the truth of the charge as to any one of the separate offenses. Consequently in such case it would be error to give it,⁹ unless, in view of the other instructions, no person of ordinary intelligence could fail to understand that the conviction must rest entirely, if at all, upon evidence directed to the particular act selected by the prosecution.¹⁰ If the prosecution has elected a particular act with reference to circumstances rather than the date, and the instruction refers to the crime so selected, it is not erroneous.¹¹

§ 376. Intent.—An instruction that in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence, is given in nearly every criminal case tried,¹² whether the elements of the offense involved call for proof of a specific intent or for proof only of such criminal negligence as is sufficient in certain cases to establish a crime. To give this instruction in a case in which specific intent must be proved is harmless where the court nowhere says that criminal negligence is all that need be shown, but specifically charges as to the necessity of proving intent.¹³ When this in-

9. *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Elgar*, 36 Cal. App. 114, 171 Pac. 697. See *People v. Reynolds*, 32 Cal. App. Dec. 992, 192 Pac. 343 (where although the evidence showed that the prosecutrix testified to other acts of intercourse, no attempt was made to establish the commission of the crime charged other than about the time alleged in the information, the instruction would not constitute error).

10. *People v. Wyett*, 33 Cal. App. Dec. 159, 193 Pac. 153; *People v. Wademan*, 38 Cal. App. 116, 126, 175 Pac. 791.

11. *People v. Allen*, 144 Cal. 298,

77 Pac. 948 (citing *People v. Sheldon*, 68 Cal. 437, 9 Pac. 457); *People v. Sykes*, 10 Cal. App. 67, 101 Pac. 20.

12. *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734 (instruction held correct). See *People v. Streuber*, 121 Cal. 431, 53 Pac. 918, holding a refusal of the instruction harmless in view of other instructions.

The use of the word "or" instead of "and" before the word "intent" is erroneous. *People v. Winters*, 93 Cal. 277, 28 Pac. 946.

13. *People v. Rowland*, 12 Cal. App. 6, 24, 106 Pac. 428.

struction is given, it is misleading to define the word "willfully" in the language of section 7 of the Penal Code and to include therein the statement that it does not require any intent to violate the law or to injure another or to acquire an advantage.¹⁴ An instruction that intent is the all-important element is properly modified to read that it is an important element.¹⁵ And a requested instruction omitting the element of criminal negligence may be refused, when the evidence is such that the jury might infer that the defendant was criminally negligent in doing the acts done.¹⁶

§ 377. Motive.—An instruction as to motive must not invade the function of the jury as judges of the facts.¹⁷ While there is no error in charging that proof of motive is not indispensable to a conviction,¹⁸ an instruction that a failure to prove motive is a circumstance in favor of innocence is an instruction with respect to a matter of fact and is properly refused,¹⁹ although it usually is

14. *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372, 381.

15. *People v. Freeman*, 29 Cal. App. 543, 156 Pac. 994.

16. *People v. Price*, 9 Cal. App. 218, 98 Pac. 547.

17. *People v. Vereneseneckcockhoff*, 129 Cal. 497, 507, 58 Pac. 156, 62 Pac. 111 (holding that an instruction involved only a question as to the probative force of evidence); *People v. Ah Fung*, 17 Cal. 377; *People v. Muhly*, 15 Cal. App. 416, 428, 114 Pac. 1017.

18. *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Petruzo*, 13 Cal. App. 574, 578, 110 Pac. 324. See *People v. Weston*, 169 Cal. 393, 397, 146 Pac. 871, holding instructions given to be unobjectionable.

19. *People v. Wilkins*, 158 Cal.

530, 111 Pac. 612; *People v. Glaze*, 139 Cal. 154, 164, 72 Pac. 965; *People v. Gorman*, 31 Cal. App. 762, 161 Pac. 757; *People v. Muhly*, 15 Cal. App. 416, 428, 114 Pac. 1017; *People v. McGee*, 14 Cal. App. 99, 111 Pac. 264. See *People v. Bernal*, 40 Cal. App. 359, 180 Pac. 825, holding that an instruction to this effect followed by Pen. Code, § 21, was not erroneous. And see *People v. Wilson*, 26 Cal. App. 336, 146 Pac. 1048, holding that an instruction that evidence or nonevidence of a motive may be considered as a circumstance tending to show guilt or innocence does not in any manner indicate the opinion of the judge as to whether motive had or had not been shown, and is not in violation of the constitution.

harmless if given.²⁰ So also an instruction to the effect that the defendant may have a hidden motive notwithstanding the inability of the people to prove one is erroneous as an argument against the defendant upon the facts.¹ Again, an instruction which gives the reasons why it is necessary to resort to circumstantial evidence in proof of motive is perhaps argumentative, but it is not, merely upon that account, ground for reversal.² If much of the evidence is direct, and not circumstantial, an instruction that proof of express motive is controlling may be refused.³

§ 378. Mental Condition and Capacity—Insanity.—When evidence of insanity of a defendant is introduced, he is entitled to a full and accurate statement of the law applicable to such defense.⁴ Hypothetical instructions directing an acquittal if the jury believe the facts set forth, may be refused, as it is better practice to state the law upon the subject of insanity and allow the jury to apply it to the evidence disclosing all the facts tending to show the defense.⁵ An instruction authorizing an acquittal if the

20. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965; *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389.

1. *People v. Enwright*, 134 Cal. 527, 66 Pac. 726; *People v. Vereneseneckcockhoff*, 129 Cal. 497, 508, 58 Pac. 156, 62 Pac. 111.

2. *People v. Argentos*, 156 Cal. 720, 106 Pac. 65.

3. *People v. Cramley*, 23 Cal. App. 340, 346, 138 Pac. 123.

4. *People v. Kelley*, 7 Cal. App. 554, 95 Pac. 45 (holding an instruction to be erroneous which authorized a conviction of the lesser degrees of murder or manslaughter if the jury should find the defendant insane, but did not authorize his acquittal in that event). See *People v. Kloss*, 115 Cal. 567, 47 Pac.

459 (holding that an instruction confusing insanity and intoxication may be refused); *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073 (approving an instruction to the effect that the want of apparent motive is evidence of an irresistible influence); *People v. Clendennin*, 91 Cal. 35, 27 Pac. 418 (disapproving an instruction as to previous irresistible impulse and unconsciousness at time of crime, because confusing). And see *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; and *People v. Pico*, 62 Cal. 50, giving approved form of instruction as to test of insanity. See *supra*, § 358 (cautionary instructions).

5. *People v. Ashland*, 20 Cal. App. 168, 182, 128 Pac. 798.

jury find the defendant to be insane should contain a sufficient definition of that legal insanity which is a defense to crime.⁶ The court may properly instruct a jury that they may consider the mental condition of the defendant before and after the commission of the crime in order to ascertain his mental condition at the time of its commission, but that a verdict of acquittal by reason of insanity should be predicated only upon insanity existing at the very time of the commission of the crime.⁷ But an instruction directing the jury not to consider whether or not the defendant is insane at the time of the trial but that they are to consider him as sane might be objectionable as an invasion of the province of the jury where insanity at the time of trial is relied upon to prove that insanity existed at the time of the commission of the offense, and which is urged as a defense. Yet this instruction will not be ground for reversal when the evidence is not specifically directed to the defendant's mental condition at the time of trial.⁸ It is not error for the court to state the law as to such defense fully with all its special limitations and qualifications, although there may be no evidence as to certain of such limitations and qualifications.⁹ The use of the word "delusion" as synonymous with "insanity" cannot mislead the jury where the evidence makes clear the sense in which it is used.¹⁰

6. *People v. Barthleman*, 120 Cal. 7, 11, 52 Pac. 112; *People v. Best*, 39 Cal. 690.

7. *People v. Kirby*, 15 Cal. App. 265, 270, 114 Pac. 794. And see *People v. Bargle*, 123 Cal. 303, 55 Pac. 998 (holding that the instruction in question could not be construed as informing the jury that the main question was as to insanity at the trial rather than insanity at the time of the crime).

8. *People v. Zeigler*, 142 Cal. 337, 75 Pac. 1090; *People v. Donlan*,

135 Cal. 489, 67 Pac. 761; *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204; *People v. Zari*, 36 Cal. App. Dec. 56, 20 Pac. 345.

9. *People v. Buck*, 151 Cal. 667, 674, 91 Pac. 529 (holding that to include an instruction as to "irresistible impulse" is not prejudicial, though the defendant relied solely upon "settled insanity" as a defense).

10. *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204.

§ 379. Intoxication.—If there is evidence of the intoxication of a defendant at the time of the commission of the crime charged against him, the court should instruct the jury as to their right to take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act;¹¹ otherwise not.¹² An instruction as to this defense, in the language of section 22 of the Penal Code, is proper and may be given.¹³ If the crime charged is divided into degrees which depend upon a particular intent, it is the duty of the court, when requested, to charge the jury to consider intoxication in determining the degree of the crime.¹⁴ In such case it is not improper to tell the jury that they may consider intoxication “only” for the purpose of determining the degree of the crime.¹⁵ But such an instruction is erroneous where the

11. See Pen. Code, § 22; *People v. Griffith*, 146 Cal. 339, 80 Pac. 68; *People v. Stein*, 23 Cal. App. 108, 116, 137 Pac. 271. See *supra*, § 358 (cautionary instructions).

12. *People v. Methewer*, 132 Cal. 326, 331, 64 Pac. 481; *People v. Kloss*, 115 Cal. 567, 47 Pac. 459 (holding that a refusal of an instruction was proper where it was proved that the defendant had been drinking the day before the crime, but it was not proved that he was intoxicated on the day of the crime); *People v. Whitlow*, 24 Cal. App. 1, 8, 139 Pac. 826.

13. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *People v. Kloss*, 115 Cal. 567, 577, 47 Pac. 459 (holding an instruction not to be objectionable because of the interpolation of the word “felonious” before the words “motive or intent” where the only

intent involved was a felonious intent); *People v. Lane*, 100 Cal. 378, 390, 34 Pac. 856. (It would be erroneous in cases where the actual existence of an intention is necessary to the offense to omit the latter clause of this section qualifying the first clause, that voluntary intoxication is no defense to crime); *People v. Collia*, 30 Cal. App. 656, 159 Pac. 229.

For other approved instructions, as to intoxication, see the following cases, *People v. Franklin*, 70 Cal. 641, 11 Pac. 797; *People v. Ferria*, 55 Cal. 588; *People v. Williams*, 43 Cal. 344; *People v. Lewis*, 36 Cal. 531.

14. *People v. Hill*, 123 Cal. 47, 55 Pac. 692; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.

15. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6; *People v. Gordan*, 103 Cal. 568, 37 Pac. 534; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581 (distinguishing *People v. Phelan*,

degree of the crime depends upon other circumstances, as in burglary,¹⁶ or where the offense is not divided into degrees at all,¹⁷ and where an instruction with reference to intent is proper. In such a case the instruction is equivalent to saying that the jury cannot consider the evidence of drunkenness for any purpose, and is erroneous. Yet even in the latter case, if the instruction cannot be misunderstood by the jury, when taken in connection with other instructions, it will not be deemed prejudicially erroneous.¹⁸

Insanity produced by intoxication.—When there is evidence of settled insanity resulting from drunkenness, the concrete instructions on the question of insanity should, with proper qualifications, be made applicable solely to insanity caused by the use of intoxicating liquors.¹⁹ But it is also well to give an abstract or general instruction on the question of insanity to enlighten the jury that settled insanity from any cause whatsoever is a defense.²⁰ An

93 Cal. 111, 28 Pac. 855); *People v. Jones*, 63 Cal. 168; *People v. Lewis*, 36 Cal. 531; *People v. Hopper*, 42 Cal. App. 499; 183 Pac. 836.

16. *People v. Dowell*, 141 Cal. 493, 75 Pac. 45 (but holding the appellant had no cause for complaint in the case at bar, as he did not claim to be so drunk as not fully to know all that occurred); *People v. Phelan*, 93 Cal. 111, 28 Pac. 855.

17. *People v. Neetens*, 42 Cal. App. 596, 184 Pac. 27 (where obtaining money by false pretenses was charged).

18. *People v. Hower*, 151 Cal. 638, 91 Pac. 507 (a prosecution for assault with intent to commit a felony in which the jury were also

instructed as to their right to convict of included offenses).

19. *People v. Goodrum*, 31 Cal. App. 430, 160 Pac. 690. For approved instructions as to insanity produced by intoxication, see *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Daily*, 135 Cal. 104, 67 Pac. 16 (in transcript on appeal, p. 201, fol. 598); *People v. Methever*, 132 Cal. 326, 64 Pac. 481; *People v. Findley*, 132 Cal. 301, 307, 64 Pac. 472; *People v. Travers*, 88 Cal. 233, 26 Pac. 88; *People v. Jones*, 63 Cal. 168; *People v. Williams*, 43 Cal. 344, 352; *People v. Lewis*, 36 Cal. 531. See *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830, holding an instruction to be contradictory.

20. *People v. Goodrum*, 31 Cal. App. 430, 160 Pac. 690.

instruction as to the defense of insanity produced by voluntary intoxication should always contain the qualifications "when sane and responsible."¹

§ 380. Parties to Offense.—An instruction telling the jury who are principals to a crime and who are accessories and stating the rules as to the guilt of the parties to the crime, should not be given unless there is evidence of a joint participation in the crime charged, or unless the fact of joint participation may be inferred from circumstances proved.² As the word "aid" does not imply a guilty knowledge or intent,³ an instruction which uses the conjunctive words "aiding and abetting" found in section 31 of the Penal Code, in the disjunctive as "aided or abetted," and authorizing the conviction of one who aids or abets the commission of the crime charged is erroneous.⁴ But the error may be cured by another instruction, from which the jury cannot fail to understand that aiding or assisting in the crime without guilty knowledge is not criminal,⁵ and it cannot be misleading where

1. *People v. Trebileox*, 149 Cal. 307, 86 Pac. 684. See *supra*, § 25.

2. *People v. Wong Hing*, 176 Cal. 699, 169 Pac. 357; *People v. Silva*, 32 Cal. App. Dec. 984, 192 Pac. 330; *People v. Lockhard*, 1 Cal. Unrep. 219; *People v. Pecte*, 36 Cal. App. Dec. 261, 202 Pac. 51. See *People v. Moran*, 144 Cal. 48, 58, 77 Pac. 777 (modification of instruction held proper); *People v. Carey*, 35 Cal. App. Dec. 829, 200 Pac. 835 (instruction held harmless in view of the evidence); *People v. Desmond*, 24 Cal. App. 408, 414, 141 Pac. 632 (instruction held inaccurate as the accused was charged both as a principal and aider and abetter); *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970 (approved instruction).

3. See *supra*, § 39.

4. *People v. Padilla*, 143 Cal. 158, 76 Pac. 889; *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *People v. Davis*, 124 Cal. 42, 56 Pac. 1131; *People v. Dole*, 122 Cal. 487, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Fredoni*, 12 Cal. App. 685, 108 Pac. 663; *People v. Matezusi*, 11 Cal. App. 465, 105 Pac. 425.

5. *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Warren*, 130 Cal. 683, 686, 63 Pac. 86; *People v. Warren*, 130 Cal. 678, 63 Pac. 87; *People v. Dole*, 122 Cal. 487, 493, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Fisher*, 30 Cal. 135, 157 Pac. 7; *People v. Fredoni*, 12 Cal. App. 685, 108 Pac. 663 (where

there is no pretense of "aid" given innocently.⁶ It seems, however, that the use of the disjunctive is not erroneous where the words used are qualified by the words "willfully and knowingly."⁷

§ 381. **Defenses.**—A defendant is entitled to have an instruction given, when it announces the law, responsive to every element of his defense shown by the evidence.⁸ If there is evidence tending to sustain a defense that the defendant was incited to commit the offense charged against him, the court on request should instruct the jury upon such defense.⁹ Or if there is evidence that the defendant though present took no part in the commission of a crime, the court on request should instruct the jury with reference thereto.¹⁰ Likewise, when the evidence tends to show that another person not acting in concert with the defendant committed the crime charged, the defendant is entitled to an instruction that the jury cannot find the defendant guilty unless there is evidence to justify the conclusion beyond a reasonable doubt that he and not someone else committed the crime charged.¹¹ But such instruction may be refused if there is no pretense that any other person committed the act,¹² or if the evi-

an instruction that "one who aids or abets" in the commission of a crime was a principal was cured by other instructions forbidding the jury to find the defendant guilty unless he "criminally" aided in the commission of the offense).

6. *People v. Morine*, 138 Cal. 626, 72 Pac. 166. See *infra*, § 609.

7. *People v. Kosta*, 14 Cal. App. 696, 112 Pac. 907 (where the court defined an accomplice to be "one who willfully and knowingly aids, encourages or assists another in the commission of a crime").

8. *People v. Newcomer*, 118 Cal.

263, 274, 50 Pac. 405 ("Instructions should not ignore any findings of fact which a jury might reasonably make upon the evidence before them"); *People v. Ashland*, 20 Cal. App. 168, 179, 128 Pac. 798; *People v. Himple*, 4 Cal. App. 120, 130, 87 Pac. 227.

9. *Peterson v. United States*, 255 Fed. 433.

10. *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176.

11. *People v. Hemple*, 4 Cal. App. 120, 129, 87 Pac. 227.

12. *People v. Scott*, 24 Cal. App. 440, 141 Pac. 945.

dence tends to show it was jointly committed by the defendant and another.¹³

§ 382. **Alibi.**—Where there is no testimony inconsistent with the presence of the defendant at the time and place of the commission of the crime the court may refuse an instruction as to alibi.¹⁴ But when evidence tending to prove an alibi is introduced, a defendant is entitled to a specific instruction as to alibi, and as to the quality of proof which is sufficient to entitle him to an acquittal in such case. And this right is not affected by the mere fact that a general instruction is given requiring proof beyond a reasonable doubt of all matters alleged in the indictment or information.¹⁵ Since a claim of alibi is not a defense,¹⁶ and need not be proved as that term is ordinarily employed, an instruction relating thereto should not refer to it as a "defense,"¹⁷ or speak of it as a good defense if "proved"¹⁸ or "estab-

13. *People v. Clack*, 145 Cal. 727, 79 Pac. 434; *People v. Olivas*, 10 Cal. App. 173, 101 Pac. 434; *People v. Roberts*, 1 Cal. App. 447, 82 Pac. 624; *People v. Chin Yuen*, 7 Cal. Unrep. 188, 77 Pac. 954.

14. *People v. Charles*, 9 Cal. App. 338, 99 Pac. 383.

15. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (not deciding whether a refusal of the instruction was reversible error); *People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233; *People v. Visconti*, 31 Cal. App. 169, 160 Pac. 410, 411 (where the supreme court in denying a rehearing said it did not wish to be understood as holding that such refusal would always be sufficient cause for a reversal). See *People v. Feliz*, 6 Cal. Unrep. 939, 69 Pac. 220, holding that where the court gave correct instructions as to an alibi,

it was not error to refuse to instruct that, if the evidence offered tends to raise a reasonable doubt as to the defendant's guilt, he should be acquitted.

16. See *supra*, § 34.

17. *People v. Roberts*, 122 Cal. 377, 55 Pac. 137; *People v. Mar Gin Suie*, 11 Cal. App. 42, 58, 103 Pac. 951 (where it is said that the characterization of an alibi as a defense is of itself almost sufficient to vitiate an instruction). See *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006 (approving instruction that "evidence of the absence of defendant is always admitted to establish a defense").

18. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137. Compare *People v. O'Neil*, 59 Cal. 259 (holding an instruction that "if it be established to the entire

lished."¹⁹ So also an instruction is erroneous which requires the defendant to prove an alibi by a preponderance of evidence.²⁰ When the time of the alleged crime is narrowed to a particular hour, proof of alibi need not include the whole of the day when the alleged offense is claimed to have been committed, but is sufficient if it creates a reasonable doubt of defendant's presence at the commission of the offense.¹ In such case, it has been said, the court, if requested, should confine the jury's consideration of the evidence to the hour, or about the hour fixed by the prosecuting witness. An unsuccessful attempt to prove an alibi is not, as a matter of law, a circumstance of great weight against a defendant, and it is erroneous so to instruct a jury.²

Cautionary instruction.—The claim of alibi is not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause, and the trial court should not so instruct the jury. But it is not error to direct the jury to scrutinize the evidence in support thereof with care where the remaining instructions are such that the jury could not be misled.³

satisfaction of the jury that the defendant was elsewhere," etc., was not erroneous in connection with an instruction as to reasonable doubt and in the absence of a request for a more specific charge); and *People v. Burns*, 59 Cal. 359, following *People v. O'Neil*, supra.

19. *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951.

20. *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021 (holding instruction in question not erroneous); *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310 (holding instruction not to be erroneous in this respect); *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463 (holding that

an instruction that it is sufficient if the defendant prove an alibi by a preponderance of evidence or sufficiently to raise a reasonable doubt of guilt is confusing). See *People v. Worden*, 113 Cal. 569, 45 Pac. 844, holding an instruction not erroneous because not including element of reasonable doubt, where the jury was elsewhere instructed as to this doctrine.

1. *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463.

2. *People v. Malaspina*, 57 Cal. 628.

3. *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091; *People v. Levine*, 85 Cal. 39, 22 Pac. 969,

Evidence.

§ 383. **In General.**—It is not improper to tell the jury the purpose for or the theory upon which certain evidence was admitted.⁴ When evidence is admitted for a limited purpose, the court should by proper instructions limit the purpose for which it can be considered by the jury, if requested to do so.⁵ Perhaps, though, it would be better if such an instruction be given in the abstract, lest it be objectionable as assuming the existence of controverted facts.⁶ When the competency of evidence depends upon preliminary proof of a collateral fact, and the court submits to the jury the question as to the existence of the facts necessary to its competency, it is proper to instruct them of the rule and of their duties in regard thereto.⁷

24 Pac. 631; *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375; *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318; *People v. Wing*, 31 Cal. App. 785, 161 Pac. 759. See *People v. Purio*, 33 Cal. App. Dec. 413, 194 Pac. 74, declaring the instruction to be of doubtful propriety. See note, 14 A. L. R. 1426, as to instructions disparaging defense of alibi.

4. *People v. Lopez*, 42 Cal. App. 369, 183 Pac. 674 (involving evidence of other offenses); *People v. Price*, 26 Cal. App. 544, 147 Pac. 591.

An instruction which states that certain statements have been admitted "on the theory" that they were dying declarations does not invade the province of the jury; *People v. Rulia Singh*, 182 Cal. 457, 188 Pac. 987.

5. *People v. Glass*, 158 Cal. 650, 664, 112 Pac. 281 (evidence of

other offenses); *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. Corey*, 8 Cal. App. 720, 729, 97 Pac. 907 (holding that the rule applies to impeaching evidence); *People v. Connelly*, 4 Cal. Unrep. 858, 38 Pac. 42. See *People v. Mathews (Edwards)*, 139 Cal. 527, 73 Pac. 416; *People v. Slaughter*, 33 Cal. App. 365, 376, 165 Pac. 44; and *People v. Price*, 26 Cal. App. 544, 147 Pac. 591, holding that the instruction given was not erroneous. See, also, *People v. Burgle*, 123 Cal. 303, 55 Pac. 998, holding that an instruction that defendant's evidence of insanity drops out of the case if the jury concludes he was sane, does not advise the jury to disregard his evidence altogether. See *Baibery*, vol. 4, p. 505, note 12.

6. *People v. Parrish*, 25 Cal. App. 314, 143 Pac. 546.

7. See *supra*, § 339.

A jury may be instructed not to consider any proposed evidence which was offered and disallowed by the court⁸ and to disregard any evidence that has been stricken out.⁹ But it has been held that the refusal to give an instruction that the jury must disregard answers stricken from the record and must draw no inferences from what they might think to be the court's opinion as to the weight to be attached to the evidence or the credibility to be given to a witness, is without prejudice, where they were instructed that they were the sole judges of the facts, and that the court had nothing to do with the questions of fact or the credit to be given witnesses.¹⁰ And a refusal to instruct the jury to disregard excluded evidence is not prejudicial where the jurors must know from the general charge given that they have no right to consider it.¹¹ It is, of course, proper to refuse a direction to disregard evidence admitted as relevant.¹²

§ 384. Presumptions and Burden of Proof in General.—

An instruction as to the presumption of continuance of insanity once shown to exist, should be limited to permanent or habitual insanity,¹³ and include the qualification that the presumption continues only until the contrary is

8. *People v. Sing Lee*, 145 Cal. 190, 78 Pac. 636.

9. *People v. Weber*, 149 Cal. 325, 346, 86 Pac. 671 (holding, also, that a request for instructions specifically naming certain witnesses may be refused where a general instruction has been given); *People v. Roberts*, 1 Cal. App. 447, 82 Pac. 624 (holding that the refusal was not prejudicial in view of an instruction that the defendant was to be tried only on the evidence before the jury).

It has been held that the use of the word "testimony" instead of "evidence" is not misleading, as the

two words are frequently used synonymously; *People v. Hubert*, 119 Cal. 217, 63 Am. St. Rep. 72, 51 Pac. 329.

10. *People v. Vaughan*, 34 Cal. App. 16, 166 Pac. 1031.

11. *People v. Maughs*, 8 Cal. App. 107, 123, 96 Pac. 407.

12. *People v. Munley*, 142 Cal. 105, 111, 75 Pac. 676; *People v. Maughs*, 8 Cal. App. 107, 123, 96 Pac. 407.

13. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204. See *People v. Findley*, 132 Cal. 301, 307, 64 Pac. 472, approving an instruction.

shown.¹⁴ If a request does not distinguish between temporary and permanent insanity in this respect, it should be refused.¹⁵

It is erroneous to instruct a jury without any qualification that identity of person is presumed from identity of name, if the evidence is such that the presumption cannot be invoked.¹⁶

It is a disputable presumption that higher evidence would be adverse from inferior being produced.¹⁷ An instruction with reference to this presumption should not be given where the defendant does not call witnesses to corroborate his testimony, as its effect in such case is to imply that the testimony of the corroborating witnesses would be higher and stronger than that of the defendant. Whenever a proper case for this instruction arises, the court should follow the language of the code provision.¹⁸

§ 385. Presumption as to Intent.—Unless controverted by other evidence, it is presumed in the law that an unlawful act was done with an unlawful intent, and that a person intends the ordinary consequences of his voluntary act.¹⁹ It is proper to instruct the jury as to these disputable presumptions.²⁰ But an instruction is proper

14. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6.

15. *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Smith*, 57 Cal. 130; *People v. Francis*, 38 Cal. 183, 188.

16. *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843. See *supra*, § 146.

17. Code Civ. Proc., § 1963, subd. 6.

18. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581 (holding it to be error to substitute the word "weaker" for "inferior"). See *infra*, § 395.

19. Code Civ. Proc., § 1963, subds. 2, 3.

20. *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405; *People v. Wilson*, 36 Cal. App. 589, 597, 172 Pac. 1116; *People v. Chutuk*, 18 Cal. App. 768, 124 Pac. 566 (holding an instruction proper where a defendant was charged with homicide, but found guilty of manslaughter); *People v. Stephens*, 29 Cal. App. 616, 157 Pac. 570, 572 (the fact that an alibi was claimed does not render the instruction improper). See *People v. McGlade*,

that a malicious and guilty intent is conclusively presumed, "from the deliberate commission of an unlawful act, for the purpose of injuring another."¹ An instruction which passes upon the question of intent where a specific intent is an essential element of the crime, trenches upon the province of the jury and is erroneous,² and it is error to instruct the jury in such a case that the burden is thrown upon the accused of proving the act to have been done without a criminal intent.³ An instruction that "a fraudulent intent" is presumed from the deliberate commission of "an unlawful act" for the purpose of injuring another has been held to be harmless where there was no evidence before the jury of acts of the defendant from which to infer a criminal intent, except the acts which went to make up the very crime with which he was charged, and which were pertinent to establish that crime.⁴

It is proper to instruct the jury that intent might be inferred from the facts and circumstances surrounding the transaction, in the absence of any declaration of the defendant upon the subject.⁵ The last clause is not objec-

139 Cal. 66, 72 Pac. 600; and *People v. Moxley*, 17 Cal. App. 466, 120 Pac. 43 (approving form of instruction).

1. Code Civ. Proc., § 1962, subd. 1. See *HOMICIDE*, as to rule in homicide cases; *People v. Zari*, 36 Cal. App. Dec. 56, 201 Pac. 345 (where the court instructed the jury that a malicious and guilty intent was conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another, and cited, although erroneously, Code Civ. Proc., § 1963, subd. 2, instead of section 1962, subdivision 1, which makes such an act conclusive as to the intent. Section 1963 of the code relates only to disputable presumptions).

2. *People v. Landman*, 103 Cal. 577, 37 Pac. 518; *People v. Mize*, 80 Cal. 41, 22 Pac. 80; *People v. Dunlop*, 27 Cal. App. 460, 467, 150 Pac. 389 (but holding the error did not result in a miscarriage of justice); *People v. Everett*, 10 Cal. App. 12, 101 Pac. 528.

3. *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082. See *supra*, § 148, as to burden of proof.

4. *People v. Jackson*, 138 Cal. 462, 465, 71 Pac. 566.

5. *People v. Hunt*, 59 Cal. 430; *People v. Bones*, 35 Cal. App. 429, 435, 170 Pac. 166, holding an instruction that "intent may be proved by all the facts and circum-

tionable as announcing that any presumption should be indulged against the defendant because of his failure to testify.⁶ An instruction is not objectionable as being argumentative because it illustrates the impossibility of determining the workings of the human mind and shows the necessity of gathering the intention with which the act was done from all the circumstances surrounding it.⁷

§ 386. Presumption of Innocence.—A defendant in a criminal case has an unquestioned right to have the jury trying him instructed as to the presumption of innocence.⁸ This presumption is distinct from the rule of reasonable doubt and is not covered by an instruction embracing that rule.⁹ Conversely, however, it has been held that an instruction that the presumption of innocence attaches at every stage of the case embraces the rule that the burden of proof does not shift.¹⁰ It is the duty of the court to give an instruction as to the presumption of innocence upon its own motion,¹¹ although a failure to do so is not error unless the instruction is requested by the defendant.¹²

Requisites of instruction.—It is proper to instruct the jury in the language of section 1096 of the Penal Code, as follows:

“A defendant in a criminal case is presumed to be innocent until the contrary is proved, and in case of a rea-

stances disclosed by the evidence and testimony taken in connection with the case” is in effect the same as the rule stated in the text and is correct.

6. *People v. Morton*, 72 Cal. 62, 13 Pac. 150.

7. *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

8. *People v. Maughs*, 149 Cal. 253, 86 Pac. 187.

9. *People v. Miles*, 143 Cal. 636, 77 Pac. 666.

10. *People v. Malone*, 25 Cal. App. 764, 145 Pac. 550; *People v. Phillips*, 12 Cal. App. 765, 108 Pac. 731.

11. *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *People v. T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416.

12. See *infra*, § 363.

sonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."¹³

However, it is not necessary to repeat the expression "beyond a reasonable doubt" if the rule of reasonable doubt is elsewhere stated.¹⁴ If the defendant requests it, the court should give a fuller instruction to the effect that the presumption of innocence accompanies the defendant throughout the trial and until his guilt is established beyond a reasonable doubt. Yet a refusal to do so is harmless, where this rule must be well known to the jury.¹⁵ An instruction is not erroneous which states that the presumption abides throughout the trial "until the evidence convinces you to the contrary beyond a reasonable doubt,"¹⁶ or "unless the contrary is established by proof beyond a reasonable doubt,"¹⁷ or "unless it has been overcome by the evidence."¹⁸ The defendant is also entitled to have the jury instructed that it is their duty, if possible, to reconcile the evidence with this presumption,¹⁹ unless they are elsewhere so informed.²⁰ But he is not entitled to have the jury informed that the presumption is to be considered as a

13. *People v. Davenport*, 13 Cal. App. 632, 637, 110 Pac. 318 (holding that the substitution of the word "shown" for "proved" is not error).

14. *People v. Crowley*, 13 Cal. App. 632, 637, 109 Pac. 493.

15. *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *People v. Miles*, 143 Cal. 636, 77 Pac. 666; *People v. Principi*, 23 Cal. App. 729, 139 Pac. 658. See *infra*, § 606.

An instruction that the presumption of innocence goes with the defendant until the case is submitted to the jury is erroneous; *People v. McNamara*, 94 Cal. 509, 29 Pac. 963.

16. *People v. Arlington*, 131 Cal. 231, 63 Pac. 347.

17. *People v. James*, 5 Cal. App. 427, 90 Pac. 561.

18. *People v. Davenport*, 13 Cal. App. 632, 637, 110 Pac. 318.

19. *People v. Winthrop*, 118 Cal. 85, 92, 50 Pac. 390 (form of instruction approved); *People v. Botkin*, 9 Cal. App. 244-258, 98 Pac. 861.

20. *People v. Patino*, 9 Cal. App. 192, 98 Pac. 199 (holding that the instruction was covered by an instruction that the presumption related to all the evidence upon the trial); *People v. Yun Kee*, 8 Cal. App. 82, 96 Pac. 95; *People v. Yee Foo*, 4 Cal. App. 730, 89 Pac. 450.

matter of evidence or instrument of proof, as it has never been deemed necessary to go into a disquisition of the foundation of the doctrine in instructing a jury.¹ While an instruction to the effect that the law is partial to the presumption of innocence may be refused as argumentative,² it is not an invasion of the province of the jury to charge them that this presumption was not intended to aid the guilty but to guard the innocent from unjust punishment.³ If the prosecution attempts to prove other offenses beside that charged, an instruction broad enough to include all should be given.⁴

§ 387. Character.—When evidence of the good character of the defendant is introduced, he is entitled to instructions stating the law with reference to such evidence.⁵ He is entitled to an instruction that his good reputation as to the traits involved in the charge, if proved, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt of guilt.⁶ But

1. *People v. Moran*, 144 Cal. 48, 59, 77 Pac. 777; *People v. Lenares*, 142 Cal. 17, 75 Pac. 308; *People v. Slaughter*, 33 Cal. App. 365, 377, 165 Pac. 44.

It has been said that it might be misleading to instruct a jury that independent of evidence, the defendant is presumed to be innocent; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187.

2. *People v. Cramley*, 23 Cal. App. 340, 138 Pac. 123.

3. *People v. Burns*, 16 Cal. App. 416, 422, 118 Pac. 454.

4. *People v. Southwell*, 28 Cal. App. 430, 152 Pac. 939, holding it error to modify the instruction by limiting it to the crime charged in the indictment. See *BRIEBRY*, vol. 4, p. 505, note 11.

5. *People v. French (Hoagland)*,

137 Cal. 218, 69 Pac. 1063 (holding the instruction should be given where a witness says that he knows the general reputation of the defendant and that it is good so far as he knows); *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971. See *People v. De La Cour Soto*, 63 Cal. 165 (holding an instruction to be correct); *People v. Casey*, 53 Cal. 360 (holding an instruction that no inference as to intention can be drawn from the previous good character of a defendant was erroneous); and *People v. Hopper*, 42 Cal. App. 499, 183 Pac. 836 (holding instruction not to be in conformity with Code Civ. Proc., § 1847).

6. *People v. Daggett*, 62 Cal. 27; *People v. Bell*, 49 Cal. 485; *People v. Raina*, 45 Cal. 292 (following

a court may modify it by adding the statement that if the jury is satisfied of the defendant's guilt beyond a reasonable doubt, it is their duty so to convict him, notwithstanding evidence of good character.⁷ An instruction is not objectionable because it states in effect that one object in laying evidence of character before the jury is to induce them to believe that there was some mistake or misrepresentation in the evidence on the part of the prosecution.⁸ When it clearly appears that a witness to character has not the knowledge requisite to enable him to testify on the subject, it is not error for the court further to qualify this instruction with the statement that character, like other facts, must be proved by competent evidence.⁹ The court should not instruct the jury that evidence of good character is to be considered with great caution.¹⁰ And it may refuse an elaborate and abstract definition of character which can serve no useful purpose.¹¹ An instruction which assumes that defendant's good character has been proved beyond question is not proper for that is a matter for the jury to determine.¹²

People v. Ashe, 44 Cal. 288; *People v. Silva*, 20 Cal. App. 121, 128 Pac. 348 (holding that the request was covered by another instruction).

See note, 10 A. L. R. 8, as to propriety of instructions as to significance of evidence concerning defendant's good character as element bearing upon the question of reasonable doubt.

7. *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500; *People v. Samsels*, 66 Cal. 99, 4 Pac. 1061; *People v. Mancuso*, 23 Cal. App. 146, 137 Pac. 278; *People v. Von Pechacs*, 20 Cal. App. 48, 127 Pac. 1048. See *People v. Mitchell*, 129 Cal. 585, 62 Cal. 187; *People v. Bowman*, 81 Cal. 566, 22 Pac. 917; and *People v. Smith*, 59 Cal. 601, 607,

for instructions held to be correct. And see *People v. Streuber*, 121 Cal. 431, 53 Pac. 918, holding erroneous an instruction that good character was conclusive of innocence.

8. *People v. French* (Hoagland), 137 Cal. 218, 69 Pac. 1063 (holding that the instruction is not a charge as to matters of fact); *People v. Shepardson*, 49 Cal. 629.

9. *People v. Velarde*, 59 Cal. 457.

10. *People v. Piner*, 11 Cal. App. 542, 553, 105 Pac. 780. See *supra*, § 356.

11. *People v. McKay*, 122 Cal. 628, 55 Pac. 594.

12. *People v. Lathrop*, 32 Cal. App. Dec. 1107, 192 Pac. 722.

If there is no testimony touching the subject of character, the court is not required to instruct the jury that the defendant is presumed to have good character,¹³ for the reason that such an instruction would be abstract, and for the further reason that there is no such presumption.¹⁴ And in such a case, it would be error to instruct the jury, at the request of the prosecution, that the prosecution cannot assail the defendant's character except when put in issue by the defendant, as the effect of such an instruction is to suggest to the jury that the defendant's character is not good.¹⁵

§ 388. Flight.—The appellate courts have for a long time discountenanced the giving of instructions in effect declaring to the jury that evidence of flight of the defendant may be considered by them and given such weight as they think fit as tending to indicate a guilty mind. This is because such an instruction is a clear invasion of the province of the jury. It has been said that where flight is unexplained, the giving of such an instruction may be excused, but not justified, because it is within the power of the defendant to explain it.¹⁶ In such case the

13. *People v. Griffith*, 146 Cal. 339, 80 Pac. 68 (explaining *People v. Gleason*, 122 Cal. 370, 55 Pac. 123); *People v. Johnson*, 61 Cal. 142; *People v. Hopper*, 42 Cal. App. 499, 183 Pac. 836; *People v. Grandi*, 33 Cal. App. 637, 165 Pac. 1027; *People v. Fleshman*, 26 Cal. App. 788, 148 Pac. 805; *People v. Cruse*, 24 Cal. App. 497, 141 Pac. 936; *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969. See *People v. Davis*, 1 Cal. App. 8, 13, 81 Pac. 716, 88 Pac. 1101, holding the instruction was properly refused because too broad and included traits of character not in issue.

14. See supra, § 145.

15. *People v. Gleason*, 122 Cal. 370, 55 Pac. 123. Compare *People v. Dolan*, 96 Cal. 315, 31 Pac. 107, holding instruction to be in favor of the defendant.

16. *People v. Jones*, 160 Cal. 358, 368, 117 Pac. 176. See *People v. Gee Gong*, 15 Cal. App. 28, 36, 114 Pac. 78, 81, per opinion of supreme court disapproving the criticism by the district court of appeal that the instruction is a charge upon a question of fact. See, also, *People v. Forsythe*, 65 Cal. 101, 3 Pac. 402, holding the evidence justified an instruction as to flight.

judgment will not be reversed because of the instruction, unless the defendant appears to have been prejudiced thereby.¹⁷ But where the defendant has given a full explanation of his flight, it is for the jury to say whether that explanation is true or not, untrammelled by any instruction that the evidence is to be weighed by them as indicative of guilt.¹⁸ Of course, to authorize such an instruction there must be evidence of flight. But evidence that the defendant surrendered himself is not such evidence of flight as will make the instruction appropriate.¹⁹ An instruction as to flight should contain the qualification that before the jury can consider it, they must first find that the defendant knew that a crime had been committed,²⁰ and perhaps, also, that he knew he was charged with the crime,¹ although, as already pointed out, there is some uncertainty as to the latter qualification.² An omission of these qualifications is harmless, however, if, under the evidence, the jury must have understood the instruction as though it contained them.³

17. *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917; *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265; *People v. Ross*, 115 Cal. 233, 46 Pac. 1059; *People v. Davis*, 14 Cal. App. 117, 111 Pac. 268.

18. *People v. Jones*, 160 Cal. 358, 368, 117 Pac. 176; *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379. Compare *People v. Easton*, 148 Cal. 50, 82 Pac. 840, holding that to give the instruction was not error, as the truth of the explanation was for the jury; and *People v. Gibson*, 39 Cal. App. 202, 178 Pac. 338, holding that the instruction could not have been misunderstood.

19. *People v. Maughs*, 8 Cal. App. 107, 122, 96 Pac. 407.

20. *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917. See *People v. Lem Deo*, 132 Cal. 199, 64 Pac.

265, holding the qualification was sufficiently stated. See, also, *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Giancoli*, 74 Cal. 642, 16 Pac. 510; *People v. Cox*, 6 Cal. Unrep. 820, 66 Pac. 725; *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688, approving instructions without this qualification.

1. *People v. Jones*, 160 Cal. 358, 117 Pac. 176.

2. See *supra*, § 158.

3. *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917; *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484.

An instruction that the jury "may well consider" evidence of flight is not erroneous because of the use of the word "well"; *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324.

§ 389. **Admissions and Confessions.**—When evidence of a defendant's confession is admitted, and the court submits to the jury the question whether or not the confession was voluntarily made, it should instruct the jury to disregard the evidence if they find it to have been involuntary.⁴ But a further instruction as to what matters should be considered in determining the question trenches upon the province of the jury and should be refused.⁵ The court should instruct the jury as to the necessity of independent proof of the corpus delicti.⁶ But a refusal to so instruct would not constitute reversible error if the evidence apart from the confession fully establishes the corpus delicti.⁷ But a refusal would be ground for reversal if the evidence of the corpus delicti, while sufficient to authorize the admission of the confession, is barely sufficient to sustain a conviction.⁸ Confessions stand upon the same footing as other evidence, and are to be weighed by the jury in the same manner. Hence, the court may tell the jury of their right in their discretion, to believe a part and disbelieve another part of a confession.⁹ But it cannot, without trenching upon the province of the jury, instruct them that declarations and confessions of a per-

4. See *supra*, § 339. See *People v. Burns*, 27 Cal. App. 227, 149 Pac. 605, holding the instruction given was somewhat confusing.

5. *People v. Hadley*, 175 Cal. 118, 123, 165 Pac. 442, where the requested instruction, if given, would have told the jury to consider the fact that the confession was elicited by questions propounded by a police officer.

6. *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Thrall*, 50 Cal. 415; *People v. Wagner*, 29 Cal. App. 363, 372, 155 Pac. 649; *People v. Eldridge*, 3 Cal. App. 648, 86 Pac. 832. See as to proof of corpus delicti, *supra*, p. 165 et seq.

7. *People v. Hopper*, 42 Cal. App. 499, 183 Pac. 836; *People v. Tomalty*, 14 Cal. App. 224, 236, 111 Pac. 513.

8. *People v. Tapia*, 131 Cal. 647, 654, 63 Pac. 1001; *People v. Wagner*, 29 Cal. App. 363, 372, 155 Pac. 649.

In such case, the fact that the requests are defective in form will not justify the court in refusing to give any instruction upon the subject, *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Tapia*, 131 Cal. 647, 654, 63 Pac. 1001.

9. *People v. Wyman*, 15 Cal. 70 (approved instruction).

son are admitted in evidence because the law presumes that he will not say anything untrue against himself.¹⁰

The court should not tell the jury to view evidence of oral admissions of the defendant with caution.¹¹ And while the peculiar circumstances of a case might call for an instruction to a jury to disregard incriminating admissions if they should find the defendant was insane when he made them,¹² the instruction may be refused when its tendency is to impress the jury that such declarations cannot be considered for the purpose of determining the defendant's sanity.¹³ When statements in the presence of the defendant and his conduct in relation thereto are proved as an implied admission, the jury should be cautioned not to allow their attention to be diverted from the conduct of the defendant to the statements of a third party, as the real evidence of the facts sought to be established.¹⁴

§ 390. Testimony of Accomplices.—Whenever warranted by the evidence in any given case, it is the duty of the trial court, especially when requested by the defendant, to instruct the jury as to the rules of law regarding the testimony of accomplices¹⁵ and as to the necessity for and the nature or degree of corroboration.¹⁶ But something

10. *People v. Piner*, 11 Cal. App. 542, 555, 105 Pac. 780.

11. See *supra*, § 359.

12. *People v. Wreden*, 59 Cal. 392.

13. *People v. Fallon*, 149 Cal. 287, 86 Pac. 689.

14. *People v. McCrea*, 32 Cal. 98.

15. *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017; *People v. Lyons*, 1 Cal. Unrep. 63 (holding in view of an express waiver of the instruction, that it is not necessary to determine the duty of the court

in the absence of a request); *People v. Camp*, 26 Cal. App. 385, 147 Pac. 95; *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63 (but holding that the failure to give such instruction did not result in a miscarriage of justice). See *People v. Ruef*, 14 Cal. App. 576, 615, 114 Pac. 48, 54, and *People v. Harrison*, 14 Cal. App. 545, 549, 112 Pac. 733, holding an instruction on the subject of accomplices to be full and fair.

16. *People v. Lyons*, 1 Cal. Unrep. 63. See *People v. Howard*, 135 Cal. 266, 67 Pac. 148 (instruction

more tangible than suspicious circumstances connected with other transactions is required to justify such instructions.¹⁷ When the question whether a witness is an accomplice is, under the evidence, a question of law for the court, it is its duty so to instruct the jury.¹⁸ But when the question is one of fact, the court should define the term "accomplice" and leave the determination of the question to them.¹⁹ It has been held that where an error in telling a jury that the prosecuting witness is an accomplice in the case is favorable to the defendant, the error is harmless.²⁰ An instruction that in case of a reasonable doubt upon the question, the jury shall consider the witness an accomplice is properly refused, because it assumes the commission of a crime, for manifestly there could be no accomplice if no crime had been committed.¹ And it has been held that an instruction that corroborative evidence is sufficient which tends "in any way" to connect the defendant with the offense is erroneous as failing to

held to be correct); *People v. Lynch*, 122 Cal. 501, 55 Pac. 248 (holding that the instruction did not sufficiently point out the necessity of corroboration); *People v. Barker*, 114 Cal. 617, 46 Pac. 601 (approved instruction as to degree of corroboration); *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082 (an instruction forbidding a conviction unless corroborative evidence "tends to impute to the defendant a knowledge that the goods were stolen," held not erroneous); *People v. Clough*, 73 Cal. 348, 15 Pac. 5 (instruction held proper); *People v. Blunkall*, 31 Cal. App. 778, 782, 161 Pac. 997 (approved instruction as to degree of corroboration).

17. *People v. Ward*, 134 Cal. 301, 310, 66 Pac. 372.

18. *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198; *People v. South-*

well, 28 Cal. App. 430, 152 Pac. 939.

19. *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Kraker*, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; *People v. Curlee*, 53 Cal. 604. But see *People v. Scott*, 1 Cal. Unrep. 68 (holding that the court should have instructed the jury that the witness was an accomplice if they believe the facts). And see *People v. Balkwell*, 143 Cal. 249, 264, 76 Pac. 1017, holding a definition given to be sufficient in the absence of a request for a better one; and *People v. Kosta*, 14 Cal. App. 696, 112 Pac. 907 (holding the definition not incorrect).

20. *People v. Sternberg*, 111 Cal. 6, 43 Pac. 198. See *infra*, § 562.

1. *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808.

take into account that it must tend to do so without the aid of the accomplice.²

Witnesses.

§ 391. Credibility in General.—The Code of Civil Procedure directs that the jury are to be instructed upon all proper occasions.

“(1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;³ (2) That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.”⁴

It has been held to be erroneous to tell a juror that he must not allow his judgment “as a man” to be confused with his judgment “as a juror”;⁵ and an instruction which directs the jury they are to believe as jurors what they would believe as men is erroneous.⁶ But it is not error to charge the jury that their judgment as reasonable

2. *People v. Davis*, 124 Cal. 42, 56 Pac. 1131; *People v. Compton*, 123 Cal. 403, 56 Pac. 44, distinguished in *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017. See *People v. Matezski*, 11 Cal. App. 465, 105 Pac. 425, approving an instruction in which the words, “in any way” were omitted.

While it has been held that it was not erroneous to give an instruction that the jury “subject to the control of the court,” are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive, it has been said that the expression, “subject to the control of the court,” may well be omitted

because somewhat equivocal; *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

3. Code Civ. Proc., § 2061, subd. 1.

4. Code Civ. Proc., § 2061, subd. 2; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888, holding the instruction given, while uncertain, was correct; *People v. Botkin*, 9 Cal. App. 244, 257, 98 Pac. 861 (approving instruction amplifying the code section); *People v. Maughs*, 8 Cal. App. 107, 122, 96 Pac. 407 (holding it to be better practice to follow the exact language of the code).

5. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15.

6. *People v. Whitney*, 53 Cal. 420.

men is the test of their right to believe or disbelieve the testimony of a witness,⁷ unless so qualified as to require them to base their belief upon the evidence in the case. If so qualified, the instruction, although useless, is not misleading.⁸

§ 392. Distrust of Witnesses False in Part.—The code directs that, on proper occasions, the jury be instructed:

“That a witness false in one part of his testimony is to be distrusted in others.”⁹

Whether or not this instruction is an invasion of the province of the jury, it relates to commonplace matters, and, as a general rule, it does not constitute reversible error either to give¹⁰ or to refuse to give it.¹¹ In giving this instruction, it is better to adhere to approved forms; and of course it is not error to give it in the language of the code.¹² But as the code section is not a complete

7. *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

8. *People v. Clark*, 183 Cal. 677, 192 Pac. 521 (reviewing cases from this and other jurisdictions); *People v. Worden*, 113 Cal. 569, 575, 45 Pac. 844, 847; *People v. Whitney*, 53 Cal. 421.

9. Code Civ. Proc., § 2061, subd. 3.

10. *People v. Grill*, 151 Cal. 592, 597, 91 Pac. 515; *People v. Votaw*, 38 Cal. App. 714, 177 Pac. 485; *People v. Russell*, 19 Cal. App. 751, 127 Pac. 829; *People v. Corey*, 8 Cal. App. 720, 728, 97 Pac. 907; *People v. Fitts*, 4 Cal. App. 432, 91 Pac. 536.

11. *People v. Delucchi*, 17 Cal. App. 96, 110, 118 Pac. 935 (on rehearing). See *People v. Ames*, 151 Cal. 303, 309, 90 Pac. 698, where a somewhat similar instruction was held to be properly refused.

12. *People v. Hower*, 151 Cal. 638,

646, 91 Pac. 507; *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *People v. Sternberg*, 127 Cal. 510, 59 Pac. 942 (holding that additional remarks by way of explanation were not erroneous); *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984; S. C., 6 Cal. Unrep. 214, 55 Pac. 984; *People v. Colvin*, 118 Cal. 349, 352, 50 Pac. 539; *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102 (holding an instruction not erroneous because of the omission of the word “material”); *People v. Treadwell*, 69 Cal. 226, 238, 10 Pac. 502 (the omission of the word “willfully” is not error, the defendant not having asked for a modification in that regard); *People v. Righetti*, 66 Cal. 184, 4 Pac. 1185 (approving an instruction substantially in the language of the code except that it added the element

statement of the rule, the fuller instruction may be given, that a witness is to be distrusted who has "willfully sworn falsely in any material matter."¹³ Indeed, when requested, this form of instruction should be given instead of the former as it is less likely to mislead the nonprofessional mind.¹⁴ The words "deliberately"¹⁵ and "discredit"¹⁶ are substantially synonymous with the words "willfully" and "distrust," respectively, and may be substituted therefor. It is not error to add to the language of the code a direction that the testimony of the witness is not to be accepted and acted upon without great caution, as this is the effect of the code section.¹⁷ But it is improper,¹⁸ although not reversible error,¹⁹ to modify the

of materiality); *Reynolds v. E. Clemens Horst Co.*, 35 Cal. App. 711, 719, 170 Pac. 1082 (explaining *People v. Plyler*, 121 Cal. 160, 53 Pac. 553); *People v. Crawford*, 24 Cal. App. 396, 406, 141 Pac. 824 (where the court says that it is better practice to give the instruction in the language of the code section).

13. *People v. Wilder*, 134 Cal. 183, 66 Pac. 228; *People v. Luchetti*, 119 Cal. 501, 507, 51 Pac. 707 (the insertion of word "willfully" held not to be error); *People v. Sprague*, 53 Cal. 422, 491 (the insertion of the word "willfully" does not change the effect of the code section); *People v. Davis*, 14 Cal. App. 117, 111 Pac. 268. See *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256 (holding that instruction given was not erroneous); *People v. Winters*, 125 Cal. 325, 57 Pac. 1067 (holding that an instruction, although not in usual form, was subject to no substantial objection); *People v. Flynn*, 73 Cal. 511, 15 Pac. 102 (holding an instruction not erroneous in which the words "in

regard to any one person, or any one particular fact in the case," were substituted for the words "as to a material point"). See *People v. Ford*, 25 Cal. App. 388, 420, 143 Pac. 1075, holding that an instruction omitting the qualifying phrase "in a material matter" was properly refused.

14. *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984; *People v. Plyler*, 121 Cal. 160, 53 Pac. 553.

15. *People v. Brown*, 28 Cal. App. 261, 152 Pac. 58.

16. *People v. Clark*, 84 Cal. 573, 582, 24 Pac. 313.

17. *People v. Righetti*, 66 Cal. 184, 4 Pac. 1185. See *People v. Harlan*, 133 Cal. 16, 65 Pac. 9, where the instruction directed the jury "to scan closely" the testimony of the witness.

18. *People v. Paulsell*, 115 Cal. 6, 12, 46 Pac. 734, not deciding whether modification would be regarded as reversible error.

19. *People v. Herrera*, 32 Cal. App. 610, 163 Pac. 879, disapproving *White v. Disher*, 67 Cal. 402, 7 Pac. 826.

instruction by inserting the word "may" for the words "is to." It is not strictly correct to advise the jury that it is their duty to distrust the entire evidence of the witness,²⁰ although instructions in this form have been held not to be erroneous,¹ or, at least, without prejudice to the defendant.² So also an instruction that the jury should disregard the testimony of the witness altogether is erroneous and may be refused.³ While it has been held that it is not reversible error for the court to instruct a jury, that they "are at liberty to"⁴ or "have a right to"⁵ discard or reject the whole testimony of a witness who willfully testifies falsely,⁶ the court may refuse so to instruct.⁷ It would be an invasion of the province of the jury, however, to charge them that they "must,"⁸ or "ought to,"⁹ or that it is their duty as a matter of law to¹⁰ reject the testimony of a witness who testifies falsely. And it is clearly error to direct the jury that they are

20. *People v. Vertrees*, 169 Cal. 404, 413, 146 Pac. 890; *People v. Delucchi*, 17 Cal. App. 96, 103, 118 Pac. 935.

1. *People v. Stevens*, 141 Cal. 488, 75 Pac. 62; *People v. Fitzgerald*, 138 Cal. 39, 45, 70 Pac. 1014. See, also, *People v. Kelly*, 146 Cal. 119, 79 Pac. 846, where an instruction that the jury "must" treat the testimony of the witness with distrust and reject all, unless convinced he in other particulars had sworn to the truth, was held not to be erroneous.

2. *People v. Delucchi*, 17 Cal. App. 96, 103, 118 Pac. 935.

3. *People v. Hicks*, 53 Cal. 354.

4. *People v. Soto*, 59 Cal. 367.

5. *People v. Wilder*, 134 Cal. 183, 66 Pac. 228; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. Ching Hing Chang*, 74 Cal. 388, 16 Pac. 201.

6. *People v. Strong*, 30 Cal. 151

(holding a modification of a request by inserting the word "willfully" was proper).

7. *People v. Wilder*, 134 Cal. 183, 66 Pac. 228 (holding that such an instruction may well be omitted where the court has already instructed the jury to distrust the testimony of a witness willfully false in a material part); *People v. Martinez*, 20 Cal. App. 343, 128 Pac. 952; *People v. Corey*, 8 Cal. App. 720, 97 Pac. 907.

8. *People v. Soto*, 59 Cal. 367; *People v. Crawford*, 24 Cal. App. 396, 406, 141 Pac. 824 (holding, however, that the error was not prejudicial in view of other instructions).

9. *People v. Soto*, 59 Cal. 367, distinguishing *Otmer v. People*, 76 Ill. 149.

10. *People v. Oldham*, 111 Cal. 648, 44 Pac. 312.

not at liberty to reject the testimony of a witness, if corroborated by other competent evidence.¹¹

An instruction pursuant to the code provision should not single out and apply to a particular witness, as such a reference would tend to lead the jury to believe that the court itself is suspicious of the witness named.¹²

§ 393. Experts and Detectives.—A court should not give instructions singling out the testimony of detectives or experts, and directing the jury as to the manner of weighing their testimony.¹³ An instruction that the value of opinions of expert witnesses depends upon the truth or falsity of the facts given to them and upon which they found their opinion, embraces no principle of law, and merely tells the jury what their own common sense would have informed them. It is, therefore, neither necessary nor proper to include it in the charge of the court.¹⁴ However, it is not prejudicial error to give such an instruction,¹⁵ even though it is confined to the expert witnesses of the defendant.¹⁶ An instruction that the abstract opinion of any expert witness is of no importance may be refused because there is no such rule of law.¹⁷

11. *People v. Compton*, 123 Cal. 403, 56 Pac. 44.

12. *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. Patterson*, 124 Cal. 102, 56 Pac. 882 (holding that where a request specifies the name of the witness, the court may insert the words "any witness" and give the instruction as modified); *People v. Demousset*, 71 Cal. 611, 12 Pac. 788 (holding an instruction properly refused). See *supra*, § 349.

13. *People v. Fritz*, 36 Cal. App. Dec. 61, 201 Pac. 348 (but holding it not reversible error to give the instruction). See *People v. McPherson*, 6 Cal. App. 266, 91 Pac.

1098, holding that an instruction requested was properly refused because it assumed, without proof, that the testimony was paid for. See *supra*, § 350, as to instructions singling out witnesses for comment; and *supra*, § 356, as to cautionary instructions.

14. *People v. Thompson*, 16 Cal. App. 748, 117 Pac. 1033; *People v. Kirby*, 15 Cal. App. 264, 271, 114 Pac. 794.

15. *People v. Barthleman*, 120 Cal. 7, 52 Pac. 112.

16. *People v. Methever*, 132 Cal. 326, 333, 64 Pac. 481.

17. *People v. Buck*, 151 Cal. 667, 91 Pac. 529.

§ 394. Credibility of Defendant.—While the rule against singling out the testimony of a witness and instructing with reference to his testimony is especially applicable if the witness be the defendant, it is not reversible error to instruct the jury that his testimony is to be weighed by the same standard as the testimony of other witnesses.¹⁸ It is usual and proper to give an instruction to the effect that the defendant's testimony should not be rejected solely because he stands accused of a crime, but should be fairly and impartially judged under the rules of evidence given.¹⁹ But inasmuch as this instruction is on the border line of error and is subject to the objection that it singles out the testimony of a single witness, it may be refused, and particularly when general instructions relating to all the witnesses are given.²⁰ An instruction that the jury are bound to presume that the defendant has spoken the truth, and is entitled to full

18. *People v. Fritz*, 36 Cal. App. Dec. 61, 201 Pac. 348 (in this case it was held that the instruction was not erroneous because of the additional clause: "No greater presumption attaches in favor of her testimony than attaches in favor of that of any other witness.")

19. *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Washburn*, 36 Cal. App. Dec. 46, 201 Pac. 335; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825; *People v. Vaughan*, 34 Cal. App. 16, 166 Pac. 1031; *People v. Fealy*, 33 Cal. App. 605, 165 Pac. 1034. See *People v. Holmes*, 126 Cal. 462, 58 Pac. 917, holding that this instruction was substantially covered by the instruction given. And see *People v. Rodundo*, 44 Cal. 538, holding that the Criminal Practice Act did not require the court in every case on

its own motion to explain how the defendant's testimony was to be weighed.

20. *People v. Ross*, 134 Cal. 256, 66 Pac. 229; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *People v. Washburn*, 36 Cal. App. Dec. 46, 201 Pac. 335 (stating that no intelligent jury needs the instruction); *People v. Vaughan*, 34 Cal. App. 16, 166 Pac. 2031 (but holding that a refusal to give the instruction is not prejudicial if the defendant's testimony does not differ materially from that of other witnesses and is sufficient of itself to justify a conviction); *People v. Blunkall*, 31 Cal. App. 778, 784, 161 Pac. 997; *People v. Dyer*, 26 Cal. App. 430, 147 Pac. 217; *People v. Monreal*, 7 Cal. App. 37, 93 Pac. 385.

credit, unless that presumption is legally repelled by his evidence, is of doubtful propriety and may be refused,¹ although it would not be prejudicial error to give it.² It is perhaps unnecessary to instruct a jury as to their right to reject the testimony of the defendant if they do not believe it.³

An instruction authorizing the jury to consider the consequences, inducements and temptations which would ordinarily influence a person in the situation occupied by the defendant, although repeatedly discountenanced, as tending to disparage the defendant, nevertheless has been approved or at least held not to be prejudicial error in a long line of cases.⁴ Finally, however, the supreme court announced that this instruction in the future would be deemed so prejudicial as to call for a

1. *People v. Tomalty*, 14 Cal. App. 224, 237, 111 Pac. 513.

2. *People v. Hill*, 1 Cal. App. 414, 82 Pac. 398.

3. An instruction which tells the jury that if the testimony of the defendant produces conviction in their minds they should act upon it, otherwise they may reject it, is an inaccurate expression of the proposition that, if the jury believe the defendant's story, he is entitled to an acquittal, and if they do not believe it, they should, in reaching a conclusion upon the question of his guilt or innocence, reject it. *People v. Fealy*, 33 Cal. App. 605, 617, 165 Pac. 1034.

4. *People v. Wells*, 145 Cal. 138, 141, 78 Pac. 470; *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904; *People v. Boren*, 139 Cal. 210, 215, 72 Pac. 899; *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *People v. Ellenwood*, 119 Cal. 166, 171, 51 Pac. 553; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *People v. Hertz*, 105 Cal. 660, 39 Pac. 32;

People v. Anderson, 105 Cal. 32, 38 Pac. 513 (holding instruction not so wide a departure from *People v. Cronin*, 34 Cal. 191, as to warrant a reversal); *People v. Hitchcock*, 104 Cal. 482, 38 Pac. 198; *People v. Lang*, 104 Cal. 363, 37 Pac. 1031; *People v. Curry*, 103 Cal. 548, 37 Pac. 503; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678; *People v. O'Brien*, 96 Cal. 171, 181, 31 Pac. 45; *People v. Faulke*, 96 Cal. 17, 30 Pac. 837; *People v. Murray*, 86 Cal. 31, 24 Pac. 802; *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790; *People v. Wheeler*, 65 Cal. 77, 2 Pac. 892; *People v. Nichols*, 62 Cal. 518; *People v. Morrow*, 60 Cal. 142; *People v. Cronin*, 34 Cal. 191; *People v. Hill*, 1 Cal. App. 414, 82 Pac. 398 (an instruction authorizing the jury to act upon defendant's testimony "if convincing and carrying with it a belief in its truth," is not erroneous); *People v. Crowl*, 4 Cal. Unrep. 355, 34 Pac. 860.

reversal.⁵ Since this decision was made, section 41½ of article VI of the constitution materially restricting the power of appellate courts to grant new trials was adopted. Therefore, under the present state of the law, the giving of this instruction will not be sufficient to warrant a reversal, unless the appellate court is of the opinion that the error resulted in a miscarriage of justice.⁶ A general instruction authorizing the jury to consider the motives and interests of witnesses in weighing their testimony may be given. And it is not error to conclude such an instruction with the statement that it applies to the defendant as well as to all other witnesses. This merely subjects him to the same general tests as the other witnesses.⁷

§ 395. Failure of Accused to Testify or Produce Evidence.—Where the defendant does not take the witness-stand, the trial court should, if requested,⁸ instruct the jury that a failure of the defendant to testify should not create a prejudice or unfavorable inference in the minds of the jury.⁹ But the court should not give an instruction that the defendant is not required to take the witness-stand and testify in his behalf,¹⁰ or read section 1323 of the Penal Code,¹¹ unless the jury is also instructed that no inference can be drawn against the defendant from

5. *People v. Maugh's*, 149 Cal. 253, 86 Pac. 187; *People v. Borrego*, 7 Cal. App. 613, 615, 95 Pac. 381. See *People v. Ryan*, 152 Cal. 364, 92 Pac. 853, holding that as the case at bar was tried before the decision of the *Maugh's* case, the instruction would not be regarded as reversible error.

6. *People v. Bojorquez*, 35 Cal. App. 350, 169 Pac. 922; *People v. Hoosier*, 24 Cal. App. 746, 759, 142 Pac. 514; *People v. Bartol*, 24 Cal. App. 659, 666, 142 Pac. 510.

7. *People v. Gibson*, 33 Cal. App. 459, 166 Pac. 585.

8. See *supra*, § 363.

9. *People v. Tyler*, 36 Cal. 522; *People v. Emmons*, 13 Cal. App. 487, 493, 110 Pac. 151. See *People v. Kirby*, 15 Cal. App. 264, 272, 114 Pac. 794, holding an instruction to be correct.

10. *People v. Romero*, 17 Cal. App. 680, 121 Pac. 698, not deciding the point because of the condition of the record.

11. *People v. Emmons*, 13 Cal. App. 487, 493, 110 Pac. 151.

such failure to testify.¹² Without such additional instruction the effect would be to emphasize the fact that the defendant did not testify, and to inform the jury that a fear of cross-examination was probably the reason therefor.

Failure to produce evidence.—When there is a failure to call an available witness, for either the prosecution or the defense, the defendant is not entitled to an instruction that it is not to be taken as evidence in the case that the defendant does not call the witness.¹³

Subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure requires the trial court on proper occasions to instruct the jury:

“That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.”

This instruction attempts to deal with the weight and effect of evidence, and should be given rarely if at all.¹⁴ To give it would clearly be erroneous if its only plausible application is to the failure of the defendant to testify in his own behalf. And the error is not cured by an instruction as to defendant's constitutional right to remain silent,¹⁵ although, under the constitution, the error is not

12. *People v. Ruef*, 14 Cal. App. 576, 608, 114 Pac. 48, 54.

13. *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *People v. Peery*, 26 Cal. App. 143 (where the daughter of the defendant upon whom he was alleged to have committed an act of rape was not called as a witness).

14. *People v. Cuff*, 122 Cal. 589, 55 Pac. 407.

15. *People v. Cuff*, 122 Cal. 589, 55 Pac. 407 (an examination of the

transcript on appeal shows that the court instructed the jury as to defendant's right to remain mute); *People v. Carroll*, 20 Cal. App. 41, 128 Pac. 4; *People v. Charles*, 9 Cal. App. 339, 99 Pac. 383. Compare *People v. Ruef*, 14 Cal. App. 576, 611, 114 Pac. 48, 54, where the court says it cannot presume that the court applied the instruction to the failure of the defendant to testify in view of instructions as to his right to remain silent.

ground for reversal unless it results in a miscarriage of justice.¹⁶ Where the occasion is proper for the giving of the instruction it cannot be given in better form than as laid down by the code.¹⁷

§ 396. Refusal of Witnesses to Testify.—The court should on request instruct the jury that the refusal of alleged co-conspirators to testify should not be considered by the jury in determining the defendant's guilt or innocence.¹⁸ And when the prosecuting attorney attempts to draw unfavorable inferences from a refusal of a witness called by the people to testify, the defendant is entitled to an instruction that no inference can be drawn against him because of such refusal. This instruction is not covered by a general instruction that a jury is to consider only the evidence in the case.¹⁹

Degree of Proof.

§ 397. In General.—In criminal cases, it is the duty of the trial court to instruct the jury as to the rule of reasonable doubt,²⁰ and, when requested, to call their attention to the difference between the character of evidence which warrants a verdict in civil and in criminal cases, and to tell them that, while a preponderance of evidence would be sufficient in the former, it would not be in the latter.¹ In addition to a general instruction, the court

16. *People v. Carroll*, 20 Cal. App. 41, 128 Pac. 4.

17. *People v. Buef*, 14 Cal. App. 576, 613, 114 Pac. 48, 54.

18. *People v. Irwin*, 77 Cal. 494, 506, 20 Pac. 56.

19. *People v. Glass*, 158 Cal. 650, 112 Pac. 281.

20. *People v. Cohn*, 76 Cal. 386, 18 Pac. 410. See *People v. Murphy*, 146 Cal. 502, 80 Pac. 709 (approved instruction).

An instruction that the jury must be convinced of the defendant's guilt "beyond all reasonable doubt" is not erroneous because the word "all" is used instead of "a"; *People v. Burns*, 121 Cal. 529, 53 Pac. 1096.

1. *People v. Rodley*, 131 Cal. 240, 259, 63 Pac. 351; *People v. Putman*, 129 Cal. 258, 61 Pac. 961 (holding the refusal so to instruct was not error as the substance of the instruction

may give a special charge relating to a specified issue,³ but it may refuse to give instructions treating all the allegations of the indictment or information separately,³ or an instruction as to a particular issue, a doubt as to which would not authorize an acquittal.⁴ A charge directing an acquittal if the jury entertain a reasonable doubt upon any single fact or element necessary to constitute the crime is not objectionable because of a failure to specify what facts are so necessary, when they are clearly stated elsewhere.⁵ An instruction that "every fact and circumstance relied upon by the prosecution" must be proved beyond all reasonable doubt, while perhaps technically incorrect,⁶ cannot be prejudicial to the defendant, as it states the law more favorable than he has a right to demand.⁷ In an early case, however, it was held that if the defendant upon the witness-stand admits the commission of the crime and relies upon an affirmative defense, an instruction as to reasonable doubt broad enough to include the fact admitted, may be refused.⁸ An instruction that a defendant cannot be convicted upon a mere suspicion is covered by the rule requiring proof beyond a reasonable doubt, and may be refused when the jury are instructed

was covered by other instructions); *People v. Lenon*, 79 Cal. 625, 631, 21 Pac. 967; *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 59 Cal. Dec. 611, 190 Pac. 656.

2. *People v. Eckert*, 19 Cal. 603 (reversing the judgment because of refusal of an instruction). Compare *People v. Briesheimer*, 176 Cal. 44, 167 Pac. 521 (a prosecution for obtaining money by false pretenses in which it was held there was nothing in the case to make imperative an instruction directed to one of the alleged false representations).

3. *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688.

4. *People v. Leira*, 27 Cal. App. 346, 149 Pac. 1004.

5. *People v. Cramley*, 23 Cal. App. 340, 138 Pac. 123. See *People v. Waysman*, 1 Cal. App. 246, 81 Pac. 1087 (holding that an instruction such as that mentioned in the text cured the defect in another instruction).

6. *People v. Kwpr Singh*, 11 Cal. App. 427, 105 Pac. 423, holding that the refusal of the instruction was not erroneous, especially when covered by other instructions.

7. *People v. James*, 5 Cal. App. 427, 90 Pac. 561.

8. *People v. Williams*, 32 Cal. 280.

as to the latter rule.⁹ A failure to embody the law of reasonable doubt in a particular instruction is not error if it is elsewhere stated.¹⁰

§ 398. Definition of "Reasonable Doubt" Generally.—

While courts frequently round out their instructions with a definition of the term "reasonable doubt," it has been suggested that the term is not so shrouded in doubt that it would be prejudicial error to refuse to define it. At all events, under the constitution, such refusal, if error, will not warrant a reversal unless the appellate court is of the opinion it has resulted in a miscarriage of justice.¹¹ When undertaking to define the term, it is proper to give an instruction in the language of Chief Justice Shaw's definition.¹² Indeed, trial courts have been frequently admonished by appellate courts to conform their

9. *People v. Escalera*, 36 Cal. App. 212, 171 Pac. 975.

10. *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Argruso*, 33 Cal. App. Dec. 329, 193 Pac. 819; *People v. Gilmore*, 6 Cal. Unrep. 57, 53 Pac. 806; *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 59 Cal. Dec. 611, 190 Pac. 656 (per opinion of supreme court denying hearing in that court); *People v. Lewis*, 18 Cal. App. 359, 123 Pac. 232; *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369; *People v. Cain*, 7 Cal. App. 163, 93 Pac. 1037; *People v. Wayman*, 1 Cal. App. 246, 81 Pac. 1087; *People v. McRoberts*, 1 Cal. App. 25, 81 Pac. 734.

11. *People v. Kelly*, 17 Cal. App. 451, 120 Pac. 46. See, also, *People v. McDonnell*, 32 Cal. App. 694, 702, 163 Pac. 1046 (where it is stated that it is doubtful whether Chief Justice Shaw's definition is of any

particular assistance to juries in most criminal cases). But see *People v. Lachanais*, 32 Cal. 433, holding it error to refuse to give Chief Justice Shaw's definition in a case based upon circumstantial evidence.

12. *People v. Lewandowski*, 143 Cal. 574, 580, 77 Pac. 467; *People v. Davis*, 135 Cal. 162, 67 Pac. 59 (holding instruction to be in substantial compliance with approved form); *People v. Fellows*, 122 Cal. 233, 238, 54 Pac. 830; *People v. Ward*, 105 Cal. 335, 343, 38 Pac. 945; *People v. Winters*, 93 Cal. 277, 28 Pac. 946; *People v. Ashe*, 44 Cal. 288; *People v. Liggett*, 18 Cal. App. 367, 123 Pac. 225. See supra, § 259, where Justice Shaw's definition is stated. See *People v. Nunley*, 142 Cal. 105, 75 Pac. 676 (holding it proper to omit that portion of Justice Shaw's definition relating to burden of proof and to state that rule elsewhere); and *People v. Graham*, 21 Cal. 261 (holding the instruction is not ob-

definitions upon the general subject of reasonable doubt to this language, rather than to attempt new departures.¹³ But it does not follow that to give other definitions constitutes reversible error.¹⁴ It is not error to refuse other definitions if Justice Shaw's definition is given,¹⁵ and, on the other hand, it is not error to refuse Justice Shaw's definition if the term is elsewhere sufficiently defined.¹⁶

§ 399. Particular Definitions.—A reasonable doubt may arise out of the evidence in the case or a lack of evidence upon some issue involved.¹⁷ But the jury is not authorized to go outside of the record to hunt for a pretext upon which they can predicate a reasonable doubt of the defendant's guilt,¹⁸ except perhaps where the hypothesis contended for by the prosecution is inconsistent with natural laws.¹⁹ Accordingly, it is held that an instruction

jectionable because of the expression that a reasonable doubt is not a mere possible doubt).

The statement therein that everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt does not render the instruction objectionable as an invasion of the province of the jury. *People v. Muhly*, 15 Cal. App. 416, 114 Pac. 1017; *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970.

13. *People v. Smith*, 164 Cal. 451, 463, 129 Pac. 785; *People v. Huntington*, 138 Cal. 261, 70 Pac. 284; *People v. Schaedde*, 126 Cal. 373, 58 Pac. 859; *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Worden*, 113 Cal. 569, 575, 45 Pac. 844; *People v. Maria de los Angeles*, 61 Cal. 188; *People v. Bickerstaff*, 31 Cal. App. Dec. 970, 59 Cal. Dec. 611, 190 Pac. 656 (by supreme court denying hearing); *People v. Ford*, 25 Cal. App. 388, 420, 143

Pac. 1075; *People v. Del Cerro*, 9 Cal. App. 764, 100 Pac. 887.

14. *People v. Huntington*, 138 Cal. 261, 70 Pac. 284.

15. *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People v. Valenzuela*, 26 Cal. App. 418, 147 Pac. 97.

16. *People v. Yun Kee*, 8 Cal. App. 32, 96 Pac. 95, distinguishing *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734.

17. *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879; *People v. Del Cerro*, 9 Cal. App. 764, 100 Pac. 887. See *People v. Ammerman*, 118 Cal. 23, 29, 50 Pac. 15; holding that when an instruction contains a clause giving the defendant the benefit of any doubt raised by argument of counsel, the court may strike out the objectionable clause.

18. *People v. Del Cerro*, 9 Cal. App. 764, 771, 100 Pac. 887.

19. But when it does not appear that the prosecution contends for

that a reasonable doubt must arise out of the evidence is not in violation of the general rule.²⁰ And an instruction directing a conviction if the jury believe beyond a reasonable doubt that the defendant did the acts charged, is not erroneous as authorizing them to derive their belief from any source irrespective of the evidence, where they are elsewhere instructed not to go outside the evidence admitted.¹ When the defendant requests an instruction that a reasonable doubt may arise from the weakness of the case made by the people, it is proper for the court to remind the jury that the doubt must arise from a consideration of all the evidence.² It is not error to instruct a jury that a reasonable doubt must be based upon reason, and cannot be based upon mere conjecture and irrational speculation,³ although it would be error to give an instruction requiring a jury to be able to assign a reason for their doubt.⁴ An instruction that reasonable doubt is a doubt growing out of the reasoning of intelligent

any hypothesis claimed to be inconsistent with any natural law, or that evidence of any natural law is relevant or material, it is not error to instruct the jury that they are not at liberty to go outside of the case to hunt for a reason for doubting the guilt of the defendant. *People v. Donguli*, 92 Cal. 607, 28 Pac. 782.

20. *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372; *People v. Del Cerro*, 9 Cal. App. 764, 771, 100 Pac. 887. *Contra*, *People v. Bartnett*, 15 Cal. App. 89, 95, 113 Pac. 879.

1. *People v. Woodson*, 29 Cal. App. 531, 156 Pac. 378.

2. *People v. Shimonaka*, 16 Cal. App. 117, 125, 116 Pac. 327.

3. *People v. Manasse*, 153 Cal. 10, 94 Pac. 92; *People v. Ross*, 115 Cal.

233, 46 Pac. 1059 (holding the instruction is not injurious, as it cannot be understood by the jury as directing them to disregard their own judgments founded upon their experiences in life); *People v. Del Cerro*, 9 Cal. App. 764, 771, 100 Pac. 887 (holding an instruction is not erroneous which states that a reasonable doubt is "such a doubt as you are able to find a reason for, in the evidence"); *People v. Yun Kee*, 8 Cal. App. 82, 96 Pac. 95.

4. *People v. Manasse*, 153 Cal. 10, 94 Pac. 92, query; *People v. Del Cerro*, 9 Cal. App. 764, 772, 100 Pac. 887. See *People v. Donguli*, 92 Cal. 607, 28 Pac. 782 (where such an instruction was held not erroneous, but this particular point was not considered except by *McFarland, J.*, specially concurring).

minds upon the doubt is meaningless.⁵ And a suggestion that the term is pretty well understood but not easily defined is unnecessary but harmless.⁶

§ 400. Certainty—Moral Certainty.—It is not error to instruct the jury in the language of section 1826 of the Code of Civil Procedure that

“The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.”

This is especially true where in view of other instructions the jury cannot be in doubt as to how to apply the evidence.⁷ An instruction that the facts must be proved to “an absolute moral certainty” may be modified by striking out the word “absolute,”⁸ or may be rejected altogether,⁹ as the word “absolute” suggests a degree of certainty greater than that moral certainty attainable in courts of justice. There is no error in directing the jury that their opinion must approach absolute certainty or conviction, that is, a conviction so perfect, complete and

5. *People v. Ah Loy*, 57 Cal. 566.

6. *People v. Ford*, 25 Cal. App. 388, 420, 143 Pac. 1075.

7. *People v. Hatch*, 163 Cal. 368, 383, 125 Pac. 907; *People v. Lima*, 36 Cal. App. 553, 172 Pac. 762; *People v. Chutuk*, 18 Cal. App. 768, 124 Pac. 566; *People v. T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416; *People v. Simmons*, 7 Cal. App. 559, 564, 95 Pac. 286 (holding unobjectionable an instruction substantially in the language of the text which contained the further statement, “and if from the evidence in the case the jury are

satisfied beyond a reasonable doubt of the guilt of the defendant, then your verdict should be one of conviction).” See *People v. Dye*, 75 Cal. 108, 16 Pac. 537, holding an instruction which uses the word “probability” instead of “possibility” is somewhat confusing.

8. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006.

9. *People v. Hecker*, 109 Cal. 451, 466, 30 L. R. A. 403, 42 Pac. 307; *People v. Davis*, 64 Cal. 440, 1 Pac. 889. See *People v. Ferry*, 84 Cal. 31, 24 Pac. 33 (overruling *People v. Strong*, 30 Cal. 154).

unconditioned as to exclude the possibility of a doubt.¹⁰ But it has also been held to be proper to refuse this instruction, because erroneous, as requiring proof beyond a possibility of doubt.¹¹

§ 401. **Satisfaction of Jury.**—When a jury is convinced of the existence of a fact to a moral certainty and beyond a reasonable doubt, it is in the nature of things entirely satisfied that the fact exists.¹² Consequently, it is not error to instruct them that the facts must entirely satisfy them of the defendant's guilt before they can convict.¹³ Indeed, it has been held error to refuse such an instruction.¹⁴ While it would be better to retain the adverb "entirely," it has been held not to be error to give the instruction without it.¹⁵ An instruction authorizing a conviction if the jury is "fairly and clearly satisfied" that the defendant committed the crime charged is not subject to criticism,¹⁶ but an instruction that the jury must be "reasonably satisfied" is objectionable standing alone, as it may be understood as meaning "satisfied by a preponderance of evidence."¹⁷ An instruction authorizing a conviction if the jury is satisfied beyond a reasonable

10. *People v. Ferry*, 84 Cal. 31, 24 Pac. 33; *People v. Beck*, 58 Cal. 212. See *People v. Webster*, 111 Cal. 381, 43 Pac. 1114, holding an instruction that the jury are not bound to be "absolutely sure" of defendant's guilt is a departure and should be refused.

11. *People v. Smith*, 105 Cal. 676, 39 Pac. 38.

12. *People v. Brannon*, 47 Cal. 96; *People v. Padillia*, 42 Cal. 535; *People v. Phipps*, 39 Cal. 326.

13. *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702; *People v. Chong Foon Ark*, 61 Cal. 527; *People v. Webster*, 13 Cal. App. 349, 109 Pac. 637 (where the words "fully

satisfied" were used). But see *People v. Loomis*, 1 Cal. Unrep. 315.

But an instruction to the effect that it is the duty of the jury to convict if the evidence entirely satisfies them of the guilt of the defendant, while not erroneous, may well be omitted. *People v. Crowl*, 4 Cal. Unrep. 355, 34 Pac. 860.

14. *People v. Cheong Foon Ark*, 61 Cal. 527.

15. *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702.

16. *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082.

17. *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566.

doubt, although they may not be entirely satisfied of the defendant's guilt, is erroneous,¹⁸ although in view of the context the phrase "entirely satisfied" may not mislead.¹⁹ So also, an instruction in effect that the guilt of the defendant must be proved to the entire satisfaction of the jury unless they seriously believe he is guilty is erroneous, the qualifying clause being uncertain.²⁰ On the other hand, however, an instruction that a defendant is entitled to an acquittal in case of a reasonable doubt as to whether his guilt is satisfactorily shown is the equivalent of an instruction making it incumbent upon the prosecution to prove guilt beyond a reasonable doubt, and is not objectionable because of the word "satisfactorily."²¹

§ 402. Defenses.—The trial court should clearly inform the jury as to the degree of proof requisite to establish facts in favor of the defendant.² An instruction that the defendant may establish any fact essential to his defense by merely a preponderance of evidence might be misunderstood by the jury,³ although it is not prejudicial if purely abstract.⁴ So also when a jury is repeatedly in-

18. *People v. Carrillo*, 70 Cal. 643, 11 Pac. 840 (The insertion of the words "beyond a possible doubt" after the words "entirely satisfied" does not cure the error in the instruction). *People v. Brown*, 59 Cal. 345; *People v. Brown*, 56 Cal. 405, 59 Cal. 345; *People v. Kerrick*, 52 Cal. 446; *People v. Padillia*, 42 Cal. 535, 540; *People v. Phipps*, 39 Cal. 326 (per Crockett, J.).

19. *People v. Ross*, 115 Cal. 233, 46 Pac. 1059.

20. *People v. Ferry*, 84 Cal. 31, 24 Pac. 33.

1. *People v. Wynn*, 133 Cal. 72, 65 Pac. 126; *People v. Carnes*, 33 Cal. App. Dec. 121, 192 Pac. 1088; *People v. Argusa*, 33 Cal. App. Dec. 329, 193 Pac. 819.

2. *People v. Harris*, 169 Cal. 53, 69, 145 Pac. 520; *People v. Carroll*, 92 Cal. 568, 28 Pac. 600 (holding that an instruction that a jury must acquit, although they have some doubt whether a fact is proved by the defendant by a preponderance of evidence, is obscure and properly refused). See *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379 (instruction approved).

3. *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *People v. Riccardi*, 33 Cal. App. Dec. 819, 195 Pac. 448; *People v. Phillips*, 12 Cal. App. 760, 765, 108 Pac. 731.

4. *People v. Flannelly*, 128 Cal. 83, 93, 60 Pac. 670 (*Temple, J., Henshaw, J., and Beatty, C. J.*,

structed to acquit if they have a reasonable doubt of defendant's guilt, instructions are harmless which require defendant to "prove,"⁵ or "establish,"⁶ his defenses, or require the jury to be "satisfied" thereof.⁷ In view of the entire charge, such words can only mean the presentation of sufficient evidence to raise a reasonable doubt in the minds of the jury.

§ 403. **Insanity.**—Instructions as to insanity should not require a greater degree of proof than a mere preponderance of evidence.⁸ Instructions are erroneous under this rule which require insanity to be "clearly proved,"⁹ or proved to the jury's "entire and perfect satisfaction,"¹⁰ or "clearly established by satisfactory proof."¹¹ An instruction that insanity must be "satisfactorily established" has been disapproved where the jury were also instructed that it must be "clearly proved."¹² But it has been held to be substantially correct to state that insanity "must be satisfactorily established, and that by a preponderance of evidence;"¹³ also that it is not error to instruct a jury

dissenting); *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998.

5. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067.

6. *People v. Mar Gin Suie*, 11 Cal. App. 42, 58, 103 Pac. 951.

7. *People v. Flannelly*, 128 Cal. 83, 93, 60 Pac. 670.

8. *People v. Miller*, 171 Cal. 649, 154 Pac. 468; *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090. See *People v. Ashland*, 20 Cal. App. 168, 181, 128 Pac. 798, holding an instruction that the law only requires a defendant to prove insanity by a preponderance of evidence is correct and that the word "merely" after the word "evidence" is not essential to the instructions.

9. *People v. Preciado*, 31 Cal.

App. 519, 160 Pac. 1090 (explaining *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651).

10. *People v. Wells*, 145 Cal. 138, 78 Pac. 470.

11. *People v. Wells*, 145 Cal. 138, 142, 78 Pac. 470; *People v. Wreden*, 59 Cal. 392 (followed in *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082). See *People v. Hamilton*, 62 Cal. 377, 384, holding the instruction to be unobjectionable when construed in connection with the remainder of the charge. Compare *People v. McDonnell*, 47 Cal. 134, apparently approving an instruction to this effect.

12. *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090.

13. *People v. Messersmith*, 61 Cal. 246; *People v. Myers*, 20 Cal. 518.

that an accused relying on the defense of insanity is bound to establish it by such a preponderance of evidence that if the question were submitted to the jury in a civil case they would¹⁴ or must¹⁵ find him insane. Such an instruction merely tells a jury that a preponderance of evidence is sufficient to sustain the defense.¹⁶

Circumstantial Evidence.

§ 404. **In General.**—When the case is not one of circumstantial evidence, the court may refuse instructions based upon that assumption.¹⁷ And where the prosecution relies for conviction upon direct evidence, the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given.¹⁸ But when a case rests entirely or chiefly upon circumstantial evidence, the court may properly give instructions in such manner as will assist the jury in reaching a correct conclusion upon the circumstances proved, notwithstanding it has also given a general charge as to the degree of proof.¹⁹

14. *People v. Suesser*, 142 Cal. 354, 365, 75 Pac. 1093; *People v. Messersmith*, 61 Cal. 246; *People v. Coffman*, 24 Cal. 230.

15. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6; *People v. McDonnell*, 47 Cal. 134.

16. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (holding that the use of the word "must" does not imply any greater proof).

17. *People v. Smith*, 164 Cal. 451, 463, 129 Pac. 785, 790; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265; *People v. Burns*, 121 Cal. 529, 53 Pac. 1096; *People v. Turner*, 65 Cal. 540, 4 Pac. 553; *People v. Gilbert*, 60 Cal. 108; *People v. Brotherton*, 47 Cal. 388, 407;

People v. Gorman, 31 Cal. App. 762, 161 Pac. 757. See *supra*, § 371.

18. *People v. Lapara*, 181 Cal. 66, 71, 183 Pac. 545; *People v. Smith*, 164 Cal. 451, 463, 129 Pac. 785; *People v. Clark*, 145 Cal. 728, 79 Pac. 434; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Holden*, 13 Cal. App. 354, 109 Pac. 495.

19. *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *People v. Holden*, 13 Cal. App. 354, 109 Pac. 495. For approved instructions, see *People v. Wilt*, 173 Cal. 477, 485, 160 Pac. 561 (as to degree of proof of links in chain of circumstantial evidence); *People v. Smith*, 106 Cal. 73, 39 Pac. 40 (approving instruction that each circumstance

The charge in such case must not authorize a conviction upon less proof than is required where the evidence is direct.²⁰ An instruction violates this rule which states that when direct evidence cannot be had, minds will act upon the probabilities of the case,¹ or which authorizes a conviction notwithstanding the evidence may not be as satisfactory to the minds of the jury as direct testimony would be. However, the defect in the latter case may be cured by other instructions.² For the same reason, an instruction authorizing a conviction if the evidence produces "nearly the same degree of certainty" as that arising from direct testimony, is probably erroneous also,³ although it was approved in some early cases.⁴ An instruction authorizing a conviction if the jury is convinced, beyond a reasonable doubt, of the defendant's guilt, *although the fact may be in a degree surrounded by a doubt*, while objectionable, standing alone, is not erroneous when the term "reasonable doubt" is defined, as the doubt referred to in the latter part of the instruction is not a reasonable doubt.⁵ The italicized words might well be omitted, how-

tending to establish guilt must be proved beyond a reasonable doubt); *People v. Ah Chung*, 54 Cal. 398 (instruction as to degree of proof); *People v. Martinez*, 31 Cal. App. 413, 420, 160 Pac. 868 (approving instruction as to degree of proof).

20. *People v. Bliss*, 41 Cal. App. 65, 182 Pac. 63 (holding that the instruction in question was not subject to the objection made).

1. *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297 (overruling *People v. Cronin*, 34 Cal. 19); *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420; *People v. Sansome*, 84 Cal. 449, 24 Pac. 145 (per *McFarland, J.*, concurring).

2. *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742 (following *People v. Dole*, in-

fra); *People v. Dole*, 122 Cal. 486, 495, 68 Am. St. Rep. 511, 55 Pac. 581 (but holding that the vice of the instruction is generally corrected by special instructions to the effect that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved); *People v. Daniels*, 4 Cal. Unrep. 248, 34 Pac. 233; *People v. Taggart*, 1 Cal. App. 423, 82 Pac. 396.

3. *People v. Sansome*, 84 Cal. 449, 24 Pac. 143, per *McFarland, J.*

4. *People v. Eckman*, 72 Cal. 582, 14 Pac. 359; *People v. Hardisson*, 61 Cal. 378; *People v. Padillia*, 42 Cal. 535, 539; *People v. Cronin*, 34 Cal. 191, 201.

5. *People v. Swearingen*, 168 Cal. 53, 141 Pac. 822; *People v.*

ever.⁶ An instruction that a jury may take into consideration all the surrounding circumstances in making up their verdict is to be understood as limited to the circumstances in evidence.⁷

§ 405. Inconsistency With Innocence.—When a case is one of circumstantial evidence, and admits of a theory either of guilt or innocence, the defendant is entitled to an instruction embodying the rule that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.⁸ An instruction embodying this rule is erroneous, however, if it substitutes the word “evidence” for “facts,”⁹ or inserts the word “absolutely” before the word “inconsistent.”¹⁰ It is not error to instruct the jury that if two opposing conclusions can with equal propriety be drawn from the evidence, one consistent with guilt, the other consistent with innocence, the latter should be adopted,¹¹ or that

Murphy, 146 Cal. 502, 80 Pac. 709; People v. Anthony, 56 Cal. 397.

6. People v. Olsen, 1 Cal. App. 17, 24, 81 Pac. 676.

7. People v. Kelly, 28 Cal. 423.

8. People v. Raber, 168 Cal. 316, 143 Pac. 317 (holding, however, that the instruction was properly refused as the case did not admit of two theories, the defendant by his own testimony having admitted his participation in the crime); People v. Nelson, 85 Cal. 421, 431, 24 Pac. 1006; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Gilbert, 60 Cal. 108; People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Dick, 32 Cal. 213; People v. Muhly, 15 Cal. App. 416, 114 Pac. 1017. See People v. Ward, 105 Cal. 335, 38 Pac. 945 (holding that the refusal of an

instruction omitting the word “rational” is proper); People v. Gosset, 93 Cal. 641, 29 Pac. 246 (holding that an instruction is erroneous which states that it is not required that the inculpatory facts be incompatible with innocence; and People v. Brotherton, 47 Cal. 388, 405 (holding that the court may strike out an additional clause in the request requiring proof of a demonstration).

9. People v. Taggart, 1 Cal. App. 423, 82 Pac. 396.

10. People v. Murray, 41 Cal. 66.

11. People v. Cornell, 29 Cal. App. 430, 438, 155 Pac. 1026; People v. Corey, 8 Cal. App. 720, 97 Pac. 907 (holding that a modification of the instruction by the interpolation of the word “equal” was not error).

they should acquit if they have any reasonable doubt as to which of two opposing results a chain of circumstances leads,¹² though the latter instruction may be refused, as both conclusions may be against the defendant.¹³ It is also proper to direct the jury, in effect, to account for any fact upon a hypothesis of defendant's innocence if they can reasonably do so.¹⁴ But inasmuch as the principle involved is substantially that embraced in the first instruction mentioned in this section, it may be refused if that be given.¹⁵

Duties of Jurors and Verdict.

§ 406. **In General.**—It is proper to instruct a jury that a case must be decided with reference to the evidence bearing upon the issues,¹⁶ and that they should not act upon their sympathies without any proof.¹⁷ It may be proper also to instruct them that they are to disregard the place of birth or nationality of the victim of the crime,¹⁸ and the situation of the defendant or the victim with reference to their families.¹⁹ It has been held, however, that an instruction particularly cautioning a jury not to be influenced by prejudices or by their suspicions, may be refused when the jury are instructed that they must look alone to the evidence.²⁰ No special admonition against being influenced by public sentiment need be given when no necessity therefor appears in the record, as when

12. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107 (distinguished in *People v. Corey*, 8 Cal. App. 720, 97 Pac. 907.

13. *People v. Clarke*, 130 Cal. 642, 63 Pac. 138.

14. *People v. Clark*, 145 Cal. 728, 79 Pac. 434.

15. *People v. Malone*, 25 Cal. App. 764, 145 Pac. 550.

16. *People v. Young*, 65 Cal. 225, 3 Pac. 813.

17. *People v. Zari*, 36 Cal. App. Dec. 56, 201 Pac. 345; *People v. Bojorquez*, 35 Cal. App. 350, 169 Pac. 922 (approved instruction); *People v. Botkin*, 9 Cal. App. 244, 259, 98 Pac. 861.

18. *People v. Taylor*, 4 Cal. App. 31, 37, 87 Pac. 215.

19. *People v. Young*, 65 Cal. 225, 3 Pac. 813; *People v. Taylor*, 4 Cal. App. 31, 37, 87 Pac. 215.

20. *People v. Holden*, 13 Cal. App. 354, 109 Pac. 495.

the jury are instructed that their verdict must be uninfluenced by any considerations whatever, except the evidence received, the law declared, and the arguments thereon.¹ It is not improper to tell the jury in effect that having the evidence and instructions of the court before them, they should exercise their best judgment in coming to a conclusion,² or that after weighing the evidence they must decide according to their consciences,³ or that in deducing the facts from the testimony they should pursue the methods followed by men of common sense.⁴ It is proper to instruct them that they should disregard statements of the prosecuting attorney of facts not proven,⁵ and that they have no right to consider the opinion of the court as to the guilt or innocence of the defendant, or to draw inferences as to the court's opinion from rulings made and questions asked by the court.⁶

It is as much the duty of a trial judge in his charge to protect a jury against being misled by improper or misleading statements or claims made in the argument as to the law which should govern them, as it is to state correctly affirmative propositions of law arising upon the evidence.⁷ The court may therefore caution the jury against attaching too much importance to cases of circumstantial evidence mentioned by defendant's counsel.⁸

Instructions as to the manner of formulating the verdict may be given.⁹ And if there are degrees of the offense

1. *People v. Feld*, 149 Cal. 464, 474, 86 Pac. 1100; *People v. Yun Kee*, 8 Cal. App. 82, 96 Pac. 95.

2. *People v. Kelly*, 132 Cal. 430, 64 Pac. 563.

3. *People v. Hubert*, 119 Cal. 216, 51 Pac. 329.

4. *People v. Tipton*, 73 Cal. 405, 14 Pac. 894.

5. *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538. See *supra*, § 327.

6. *People v. Osborn*, 12 Cal. App. 148, 106 Pac. 891.

7. *People v. McCarthy*, 115 Cal. 255, 264, 46 Pac. 1073 (approving instruction correcting contention as to want of motive being evidence of irresistible influence); *People v. Taylor*, 4 Cal. App. 31, 87 Pac. 215.

8. *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Wilson*, 23 Cal. App. 513, 522, 138 Pac. 971.

9. *People v. Brady*, 6 Cal. Unrep. 719, 65 Pac. 823 (instruction held to be correct).

charged, the court should, if requested, direct them as to their duty, if they convict the defendant, to find the degree of his offense.¹⁰

§ 407. Duty to Reason Together—Individual Judgment of Jurors.—It is proper to instruct the jury in effect that the defendant is entitled to the independent judgment of every juror and that they are not required to surrender their honest convictions for the mere purpose of agreeing upon a verdict.¹¹ But the mere failure so to instruct the jury is not an error of sufficient gravity to warrant a reversal, especially when the jury is fully instructed upon the law of reasonable doubt generally.¹² In this connection, while the jurors should neither be exhorted to reach an agreement nor lectured to make them steadfast in their individual opinions,¹³ they may be instructed to make a reasonable effort to come to some conclusion one way or

10. *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 64 (holding, however, that a refusal of the instruction is harmless if it is covered by the remainder of the charge).

11. *People v. Watson*, 165 Cal. 645, 653, 133 Pac. 298; *People v. Wong Loung*, 159 Cal. 520, 535, 114 Pac. 829; *People v. Howard*, 143 Cal. 316, 323, 76 Pac. 1116 (per Beatty, C. J., concurring); *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *People v. Svendsen*, 25 Cal. App. 1, 142 Pac. 861; *People v. Singh*, 20 Cal. App. 146, 128 Pac. 420. See *People v. Weber*, 149 Cal. 325, 347, 86 Pac. 671, holding that the instruction may be modified by substituting for the words "the defendant" the words "each side."

12. *People v. Perry*, 144 Cal. 748, 78 Pac. 284; *People v. Hill*, 116 Cal. 562, 569, 48 Pac. 711; *People*

v. Walton, 35 Cal. App. Dec. 316, 199 Pac. 824; *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477; *People v. Kiser*, 24 Cal. App. 540, 547, 141 Pac. 1078; *People v. Whitlow*, 24 Cal. App. 1, 9, 139 Pac. 826; *People v. Singh*, 20 Cal. App. 146, 128 Pac. 420; *People v. Davenport*, 17 Cal. App. 557, 120 Pac. 451; *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688; *People v. Loomer*, 13 Cal. App. 654, 110 Pac. 456; *People v. Simmons*, 7 Cal. App. 559, 564, 95 Pac. 48; *People v. Darr*, 3 Cal. App. 50, 84 Pac. 457; *People v. Davis*, 1 Cal. App. 8, 12, 81 Pac. 716, 88 Pac. 1101.

13. *People v. Radley*, 131 Cal. 249, 259, 63 Pac. 351 (holding that an instruction that the jurors are not to compromise or sacrifice their views or opinions in deference to those of the others is erroneous and properly refused).

another,¹⁴ and to reason with one another to the end that they may join in a lawful verdict.¹⁵ While jurors should be instructed that it is their duty, where not convinced beyond a reasonable doubt of the guilt of the defendant, to adhere to their opinion until so convinced,¹⁶ on the other hand, they may also be told that they should not hesitate to sacrifice their views or opinions of the case when convinced that they are erroneous.¹⁷

The court may call the attention of the jury to the importance to the public of having the laws properly executed,¹⁸ especially where it directs them that they should also keep in mind the importance of the result of their deliberations to the accused and that they should be just to him.¹⁹

§ 408. Danger of Convicting Innocent Persons.—While a jury has a right to consider that innocent persons have been convicted in the past,²⁰ an instruction to this effect

14. *People v. Miles*, 143 Cal. 636, 77 Pac. 666 (holding it not error to remind the jury of the expense of the trial); *People v. Palencia*, 32 Cal. App. 631, 163 Pac. 865.

15. *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

16. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709. See *People v. Whitlow*, 24 Cal. App. 1, 9, 139 Pac. 826 (holding it was not error to refuse the instruction, as it was covered by other instructions).

17. *People v. Wilt*, 173 Cal. 477, 160 Pac. 561; *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970 (holding instruction correct).

While perhaps unnecessary, the jury may be admonished of their duty to reason fairly and honestly with one another upon the evidence, and against the fault of adhering, out of pride of opinion or the like, to an opinion

once formed, although subsequently convinced of its erroneousness; *People v. Miller*, 177 Cal. 404, 170 Pac. 817; *People v. Valencia*, 32 Cal. App. 631, 163 Pac. 865 (approved instruction); *People v. Davenport*, 17 Cal. App. 557, 120 Pac. 451. See *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970 (approved instruction). But see *People v. T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416, holding that an instruction embracing the converse of this proposition and directed to a juror convinced of the defendant's guilt is in conflict with the presumption of innocence.

18. *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.

19. *People v. Wolff*, 182 Cal. 728, 190 Pac. 22.

20. *People v. Travers*, 88 Cal. 233, 26 Pac. 88 (holding it error to instruct the jury otherwise).

contains matter more appropriate to argument of counsel than to instructions of a court, and on that account may properly be refused.¹ However, it may not be amiss in certain cases so to instruct the jury,² cautioning them, however, against attaching too much importance to cases in which innocent persons have been convicted,³ and to consider that guilty persons have sometimes been acquitted, and the danger to society of acquitting a guilty person.⁴ It is, however, not incumbent on a court to instruct the jury that it is safer to err in acquitting.⁵

§ 409. Right to Convict of Lesser Offenses.—In every trial of an offense which includes lesser offenses, it is the duty of the court, on request, when the evidence justifies it, to inform the jury that lesser offenses are included in the charge, and that their verdict may be framed upon those lines.⁶ Such instructions are usually given, and should be given, by the trial court upon its own motion

1. *People v. Nunley*, 142 Cal. 105, 75 Pac. 676; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Findley*, 132 Cal. 301, 308, 64 Pac. 472; *People v. Durrant*, 116 Cal. 179, 222, 48 Pac. 75; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Machado*, 6 Cal. Unrep. 600, 63 Pac. 66; *People v. Smith*, 13 Cal. App. 627, 110 Pac. 333.

2. *People v. Sternberg*, 127 Cal. 511, 59 Pac. 942.

3. *People v. Travers*, 88 Cal. 233, 26 Pac. 88; *People v. Shim Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Cronin*, 34 Cal. 191.

4. *People v. Sternberg*, 127 Cal. 511, 59 Pac. 942.

5. *People v. Ebanks*, 117 Cal. 652, 667, 40 L. R. A. 269, 49 Pac. 1049; *People v. Durrant*, 116 Cal. 179, 222, 48 Pac. 75; *People v. Currie*, 16 Cal. App. 731, 117 Pac. 941.

6. *People v. Comyns*, 114 Cal. 107, 45 Pac. 1034 (grand larceny); *People v. Demasters*, 105 Cal. 669, 39 Pac. 35; *People v. Jones*, 53 Cal. 58; *People v. Wilson*, 29 Cal. App. 563, 156 Pac. 377; *People v. Cramley*, 23 Cal. App. 340, 138 Pac. 123 (holding the giving of the instruction not prejudicial); *People v. Carroll*, 20 Cal. App. 41, 128 Pac. 4; *People v. Tansy*, 11 Cal. App. 220, 104 Pac. 582; *People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386; *People v. Stofer*, 3 Cal. App. 417, 86 Pac. 734 (rule applies in grand larceny cases). See *People v. Marshall*, 120 Cal. 70, 52 Pac. 129; and *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405 (approving instructions). And see *People v. Fine*, 53 Cal. 263 (holding it error to instruct the jury that if they convict, they must convict of the offense charged).

in the absence of a request,⁷ but the defendant cannot complain of the omission unless he requests that the instruction be given.⁸ Although reversals have been granted because of a refusal to give such an instruction,⁹ it has been held that an omission or refusal to do so is favorable error, for the reason that it will not be presumed that the jury would convict of the higher offense because not permitted to convict of the lesser. The natural presumption in such case, is that, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt of the higher offense, they will perform their duty and acquit, where, if guilty of anything he is guilty of the higher offense and where no request is made for an instruction that a conviction of the lesser offense might be permitted.¹⁰

When a court undertakes to instruct the jury as to their right to convict of included lesser offenses, it should not omit to mention any offense the conviction of which is warranted by the evidence, even though the defendant may not have requested an instruction mentioning such offense.¹¹ It may, of course, omit any offense which is not included in the offense charged,¹² or of which a conviction would be unwarranted by the evidence.¹³ But whatever the state of the evidence, it is always dangerous for the court to suggest that he does not think there can

7. *People v. Watson*, 125 Cal. 342, 57 Pac. 1071; *People v. Church*, 116 Cal. 300, 48 Pac. 125; *People v. Demasters*, 105 Cal. 669, 39 Pac. 35.

8. See *supra*, § 363, as to necessity for request.

9. *People v. Comyns*, 114 Cal. 107, 45 Pac. 1034; *People v. Demasters*, 105 Cal. 669, 39 Pac. 35.

10. *People v. Clark*, 145 Cal. 727, 79 Pac. 434; *People v. Lopez*, 135 Cal. 23, 66 Pac. 965; *People v. Warr*, 22 Cal. App. 663, 670, 136

Pac. 304; *People v. Brown*, 3 Cal. App. 178, 84 Pac. 670.

11. *People v. Watson*, 125 Cal. 342, 57 Pac. 1071, distinguishing *People v. Arnold*, 116 Cal. 682, 48 Pac. 803, on the ground that the evidence did not justify such an instruction.

12. *People v. Piercy*, 16 Cal. App. 13, 116 Pac. 322.

13. *People v. Lopez*, 135 Cal. 23, 66 Pac. 965; *People v. Arnold*, 116 Cal. 683, 48 Pac. 803; *People v. Lopez*, 42 Cal. App. 369, 183 Pac. 674. See *infra*, § 438.

be a conviction of an attempt.¹⁴ An instruction that the jury may convict of several specified offenses or acquit the defendant altogether "as in their judgment the evidence may warrant," is not erroneous because of the quoted words, where, in view of the remainder of the instructions, the jury cannot be misled.¹⁵

§ 410. Where Evidence Does not Justify Conviction of Lesser Offense.—Under the rule that instructions must be applicable to the facts,¹⁶ it is not error to omit or refuse to instruct the jury of their right to convict of lesser offenses included in that charged, when the evidence shows, or tends to show, that the defendant if guilty of any offense at all, is guilty only of the offense charged.¹⁷

14. *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

15. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596.

16. See *supra*, § 371.

17. *People v. Wright*, 167 Cal. 1, 138 Pac. 349; *People v. Rogers*, 163 Cal. 476, 482, 126 Pac. 143 (murder committed in the perpetration of a felony); *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74 (aggravated assault by person undergoing a life sentence); *People v. Carson*, 155 Cal. 164, 99 Pac. 970 (aggravated assault by one undergoing a life sentence); *People v. Finley*, 153 Cal. 58, 94 Pac. 248; *People v. Allen*, 144 Cal. 299, 77 Pac. 948; *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *People v. Stevens*, 141 Cal. 488, 75 Pac. 62 (robbery); *People v. Swist*, 136 Cal. 520, 69 Pac. 223 (assault with intent to commit crime against nature); *People v. Wilson*, 135 Cal. 331, 67 Pac. 322; *People v. Fellows*, 122 Cal. 233, 240, 54 Pac. 830; *People v. Chaves*, 122 Cal. 134, 54 Pac. 596; *People v. Winthrop*, 118 Cal. 85, 50

Pac. 390; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Stanton*, 106 Cal. 139, 39 Pac. 525 (holding that it is not necessary to instruct as to the right to convict of an assault or attempt, where every element of the offense is shown without contradiction); *People v. Chavez*, 103 Cal. 407, 37 Pac. 389 (rape); *People v. McNutt*, 93 Cal. 658, 29 Pac. 243 (assault with a deadly weapon); *People v. Wright*, 93 Cal. 564, 29 Pac. 240 (mayhem); *People v. Scott*, 93 Cal. 516, 29 Pac. 123 (assault with intent to commit murder); *People v. Barry*, 90 Cal. 41, 27 Pac. 62 (assault with intent to commit robbery); *People v. Madden*, 76 Cal. 52, 18 Pac. 402 (assault with deadly weapon); *People v. Guidice*, 73 Cal. 226, 15 Pac. 44; *People v. Franklin*, 70 Cal. 641, 11 Pac. 797; *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183; *People v. Soto*, 63 Cal. 165; *People v. Turley*, 50 Cal. 469; *People v. Estrado*, 49 Cal. 171; *People v. Haun*, 44 Cal. 96 (where in a prosecution for murder the

It is, in such case, no violation of the constitutional prohibition against charging the jury with respect to matters of fact for a trial court to assume that the offense is not a lesser included one.¹⁸ Indeed, in such a case the court may instruct the jury that they cannot find the defendant guilty of any lesser offense,¹⁹ although it has been held that it would be erroneous for the court to add to its instruction a statement that there are no circumstances in the case to reduce the offense below that charged.²⁰ Upon the other hand, to give an instruction authorizing a conviction of lesser offenses, where the evidence does not justify it, is error in favor of the defendant, of which he cannot complain.¹ In this connection it is the evidence introduced, not the theory advanced by

defendant relied upon the claim of self-defense and there was no proof tending to reduce the grade of crime); *People v. Byrnes*, 30 Cal. 207 (holding that the court need not define murder in the second degree in view of the evidence); *People v. Davis*, 4 Cal. Unrep. 524, 36 Pac. 96 (assault with intent to commit murder); *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506; *People v. William Yee*, 37 Cal. App. 579, 174 Pac. 343; *People v. Henry Quan Chuck*, 24 Cal. App. 471, 141 Pac. 940; *People v. Kelley*, 24 Cal. App. 54, 140 Pac. 302; *People v. Profumo*, 23 Cal. App. 376, 138 Pac. 109; *People v. Ong Git*, 23 Cal. App. 148, 156, 137 Pac. 283; *People v. Ashland*, 20 Cal. App. 168, 128 Pac. 798; *People v. Carroll*, 20 Cal. App. 41, 128 Pac. 4 (grand larceny); *People v. Rhodes*, 17 Cal. App. 789, 121 Cal. 925; *People v. Fitts*, 4 Cal. App. 432, 91 Pac. 536 (assault with intent to commit robbery). See *People v. Demasters*, 105 Cal. 669, 39 Pac. 35 (holding rule to be inapplicable where an aggravated assault is charged, as

the higher offense is not committed unless a simple assault is made).

18. *People v. Welch*, 49 Cal. 174, 181.

19. *People v. Wright*, 93 Cal. 564, 29 Pac. 240; *People v. O'Brien*, 88 Cal. 483, 490, 26 Pac. 362; *People v. Quincy*, 8 Cal. 89.

Where there is no conflict in the evidence as to the nature of the crime, but as to the perpetrator, it is not error for the judge to state to the jury that he understands the crime is that charged or nothing. *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375.

20. *People v. Ah Lee*, 60 Cal. 85. But see *People v. King*, 27 Cal. 507, 87 Am. Dec. 95, holding it permissible to charge that there is no evidence of facts which would reduce the crime charged to manslaughter.

1. *People v. Cipolla*, 155 Cal. 224, 100 Pac. 252; *People v. Clark*, 145 Cal. 727, 79 Pac. 434; *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021; *People v. Washburn*, 36 Cal. App. Dec. 46, 201 Pac. 335; *People v. Tugwell*, 32 Cal. App. 520, 163

the prosecution or defense, which determines whether the instruction shall be given.²

§ 411. Punishment.—Except upon a prosecution for murder in the first degree,³ or for rape committed upon a female over the age of sixteen and under eighteen years,⁴ the jury have nothing to do with the punishment of crime, and so it has been said that it is not commendable practice to inform them of the consequences of their verdict.⁵ But an instruction in violation of this rule, when correct in point of law, is not one of which the defendant may justly complain, as its influence upon the jury is said to be favorable to him.⁶ In those cases in which the jury have the power to fix the punishment, the court cannot direct or advise them how they should use the discretion given them,⁷ and should refuse argumentative instructions relating to the nature and extent of punishment.⁸ But it does not follow that the discretion of the jury is to be exercised without any instruction as to the grounds or reasons for the mode in which it shall be exercised.⁹ Such instructions should be pertinent and have proper reference to the evidence, and their propriety in a given case should be governed by the same rules of law applicable to instructions upon the principal issue in the case.¹⁰

Pac. 508; *People v. Roselle*, 20 Cal. App. 420, 129 Pac. 477; *People v. Gallaner*, 3 Cal. App. 431, 86 Pac. 814. See *infra*, § 562 (favorable errors generally).

2. *People v. Wright*, 167 Cal. 1, 138 Pac. 349 (explaining *People v. Huntington*, 138 Cal. 261, 70 Pac. 284, and *People v. Huntington*, 8 Cal. App. 612, 97 Pac. 760).

3. See Pen. Code, § 190; and generally, see *HOMICIDE*.

4. See Pen. Code, § 264; and generally, see *RAPE*.

5. *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511.

6. *People v. Griffith*, 146 Cal. 339, 80 Pac. 68; *People v. Dice*, 120 Cal. 189, 202, 52 Pac. 477; *People v. Jackson*, 57 Cal. 316.

7. *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090.

8. *People v. Clayberg*, 26 Cal. App. 614, 621, 147 Pac. 994.

9. *People v. Rogers*, 163 Cal. 476, 483, 126 Pac. 143; *People v. Olsen*, 80 Cal. 122, 128, 22 Pac. 125. See *HOMICIDE*, for discussion of sufficiency of instruction.

10. *People v. Atherton*, 51 Cal. 495.

VII. THE JURY.

§ 412. **Presence of Jury During Proceedings.**—Inasmuch as questions of law are for the court, it is discretionary with the trial court whether to exclude the jury from the courtroom during argument upon such questions.¹¹ As it has been said, “Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming to their knowledge during the trial.”¹² Accordingly, if the court determines that the interests of the parties demand it, it may exclude the jury from the courtroom during argument upon a motion for a nonsuit,¹³ or while an offer of evidence is being made.¹⁴ So also it has been held that the court may exclude the jury from the courtroom while the preliminary examination into the competency of a witness is being conducted.¹⁵ But in a late case the question whether a defendant has a right to have such an examination conducted in the presence of the jury was raised but not decided. The court said, however, that although the question of the witness’ competency is for the court, there is force in the contention that the jury would have a right to consider to some extent the testimony given as to the witness’ competency in determining his credibility.¹⁶ It is better practice to announce, in the absence of the jury, a decision denying a motion to permit a defendant additional counsel.¹⁷ So also an investigation into the matter

11. *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506; *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200.

12. *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200.

13. *People v. Tomlinson*, 102 Cal. 19, 36 Pac. 506.

14. *People v. Fernandez*, 4 Cal. App. 314, 87 Pac. 1112.

15. *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200.

16. *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784, per Chipman, P. J.

17. *People v. Gregory*, 120 Cal. 16, 52 Pac. 41. But holding the failure to do so will not be ground for reversal where nothing was said or done by the court upon which to predicate error.

of bribery of a witness or juror should be conducted in the absence of the jury so that they may not be influenced by developments arising therefrom;¹⁸ and especially should this be done if a request that the jury be excused is made.¹⁹

§ 413. Furnishing Jury With Food and Lodging—Payment for Services.—At common law, the jurors were “kept without meat or drink, fire or candle, until they agreed.”²⁰ The senseless severities of this ancient rule no longer exist. In California, the rule is prescribed in section 1136 of the Penal Code, which is as follows:

“While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court must direct the sheriff to provide the jury with suitable and sufficient food and lodging, or other reasonable necessities. And the auditor, upon the order of the court, shall draw his warrant for the expenses so incurred, and the same shall be paid by the treasurer of the county, or city and county, out of the general fund.”

It has been said that it requires no argument to show that intoxicating liquors are not “suitable food,” within the meaning of the statute.¹

Accommodations for jury.—The code provides that a room must be provided for the use of the jury, with suitable furniture, fuel, lights, and stationery; and provision is also made for separate rooms and accommodations when the jury is composed of both men and women. A failure to provide separate rooms for the male and female jurors

18. *People v. Abbott*, 101 Cal. 645, 36 Pac. 129; *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500.

19. See *People v. Durrant*, 116 Cal. 179, 48 Pac. 75, holding the punishment of one making threats to the jury is not prejudicial because had in the presence of the

jury, especially where no request that the jury be excused is made.

20. *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549 (per Sharpstein, J., concurring).

1. *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549 (per Myrick, J., concurring). See *infra*, § 448.

cannot be held prejudicial to the rights of a defendant in the absence of a showing to that effect.²

Fees of jurors.—Section 1143 of the Penal Code fixes the amount of the fees of the jurors and makes provision for payment thereof.

§ 414. Separation Before Submission of Cause.—The separation of the jury after they are sworn, and during trial, was never permitted at common law in cases of felony, and in many states is not now permitted in capital cases.³ The law in California is declared in section 1121 of the Penal Code, which provides as follows:

“The jurors sworn to try an action may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.”

This section is not in conflict with the constitutional provision that the right of a trial by jury shall be secured to all and remain inviolate.⁴ Whether the jury shall be allowed to separate at adjournments and recesses rests in the discretion of the trial court,⁵ even in capital cases.⁶ A separation would be improper after the jury had been placed in charge of an officer, unless had with the consent of the defendant at a time when no evidence is actually being received.⁷ It is not prejudicial error, however, to

2. *People v. Barrios*, 35 Cal. App. Dec. 111, 199 Pac. 58.

3. *People v. Hawley*, 111 Cal. 78, 43 Pac. 404.

4. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596.

5. *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049; *Peo-*

ple v. Coyne, 116 Cal. 295, 48 Pac. 218.

6. *People v. Witt*, 170 Cal. 104, 148 Pac. 928; *People v. Chaves*, 122 Cal. 134, 54 Pac. 596.

7. *People v. Maugh*, 149 Cal. 253, 86 Pac. 187. A juror may be allowed to go in charge of an officer

excuse a juror for a few minutes during the examination of a witness, no proceedings being had during his absence.⁸ This code section does not apply to an order made before the completion of the panel. If such an order is made with the intention that it shall have force temporarily only, a separation during trial, not in violation of the order, is not reversible error.⁹

There is no "separation" within the meaning of the law, when the jury are walking in groups in sight of each other,¹⁰ nor when they are being taken to view the scene of the crime, and are being transported in different conveyances always in sight of each other. So also a jury is sufficiently kept in a body when they sleep in separate rooms to which there is no means of access except by a stairway where the sheriff and his deputy were stationed.¹¹ A defendant who consents that one of the jurors may pass over the roof of certain buildings cannot object to the temporary separation of such juror from the remainder of the jurors, where it does not appear that any misconduct occurred during the separation which caused him substantial injury.¹²

§ 415. Separation After Submission of Cause.—Section 1128 of the Penal Code provides, in part, as follows:

"After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or

to visit a member of his family who is sick, where the defendant consents; *People v. Cord*, 157 Cal. 562, 108 Pac. 511. See *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407 (query).

8. *People v. Witt*, 170 Cal. 104, 148 Pac. 928 (where no officer accompanied the juror).

9. *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407.

10. *People v. Symonds*, 22 Cal. 348.

11. *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

12. *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998.

to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court."

The law requires that the jurors be kept together during their deliberations, and, except as the code allows it, the court cannot permit a separation,¹³ even with the consent of the defendant or his counsel.¹⁴ An unauthorized separation of the jury after the submission of the cause is ground for a new trial,¹⁵ but it does not operate as an acquittal or authorize the discharge of the defendant.¹⁶

§ 416. Officer in Charge.—While no statute or code provision speaks expressly upon the subject, it is apparent that the same reasons which forbid the sheriff to summon jurors when he is biased should forbid his being intrusted with the care of the jury when it retires to deliberate.¹⁷ When the sheriff is disqualified his deputy is also disqualified, and in such case the coroner should act.¹⁸ If the sheriff and coroner are both disqualified or ill and physically unable to take charge of the jury, the court should appoint an elisor.¹⁹ But it is error to make such appointment upon the ex parte affidavits of the prosecution without allowing the defendant to be heard both as to the fact of the disqualification of the sheriff and coroner and as to the disqualification of the elisor.²⁰

13. *People v. Hawley*, 111 Cal. 78, 43 Pac. 404; *People v. Branigan*, 21 Cal. 337 (under similar provision in the Criminal Practice Act); *People v. Barrios*, 35 Cal. App. Dec. 111, 199 Pac. 58. See *supra*, § 413.

14. *People v. Hawley*, 111 Cal. 78, 43 Pac. 404; *People v. Backus*, 5 Cal. 275.

15. See *infra*, § 449.

16. *People v. Hawley*, 111 Cal. 78, 43 Pac. 404.

17. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830.

18. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Stennett*, 34 Cal. App. Dec. 501, 783, 197 Pac. 372.

19. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049. And cases *supra*. See Pol. Code, § 4173.

20. *People v. Schmitz*, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717, 94 Pac. 407, 419.

§ 417. Admonishing Jury upon Adjournments.—Section 1122 of the Penal Code provides:

“The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the case is finally submitted to them.”

This requirement ought always to be strictly complied with.¹ But a failure of the court to admonish the jury at a particular adjournment or separation is not ground for a reversal, if no prejudice resulted therefrom.² The statute refers to “each adjournment,” and under a similar provision in the Criminal Practice Act, it has been questioned whether it is applicable to mere temporary recesses, where there is no actual adjournment.³

§ 418. Conduct of Jury.—Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under their oath, receive impressions from any other source.⁴ The Penal Code, therefore, requires that at each separation of the jury they must be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.⁵ It also provides that if an officer is sworn to keep the jury together, he must be sworn to suffer no person to speak

1. *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

2. *People v. Witt*, 170 Cal. 104, 148 Pac. 928; *People v. Coyne*, 116 Cal. 295, 48 Pac. 218; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384; *People v. Colmere*, 23 Cal. 631

(under the Criminal Practice Act); *People v. McKeehan*, 11 Cal. App. 443, 105 Pac. 273.

3. *People v. Colmere*, 23 Cal. 631.

4. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

5. See *supra*, § 417.

to them or communicate with them, nor to do so himself, on any subject connected with the trial.⁶ These admonitions are important and should be observed.⁷ The jurors should abstain from reading any articles relative to the case they are trying,⁸ and from talking to anyone or allowing anyone to talk to them concerning the case,⁹ and refrain from allowing themselves to receive any information or impression concerning the case from any source other than the evidence, argument and instructions given in open court.¹⁰ Yet the admonitions to the jurors and to the officer in charge of them are to be given a reasonable construction. An emergency might arise making it imperative for the officer in charge of the jury to enter the jury-room for the purpose of meeting the emergency, and to take with him a person suitable to assist him, a physician, for example. And if in such case no one speaks to a juror upon any subject connected with the trial, the defendant is not prejudiced.¹¹ It is not misconduct for jurors to converse with each other, in reference to matters not connected with the case.¹² Nor is it improper for a juror who does not clearly hear what was said to ask a fellow-juryman whether the testimony is as he understands it.¹³ While it may be improper to transmit forms of verdict to the jury by the hand of the sheriff, there is no invasion of the defendant's substantial rights where

6. See *supra*, §§ 414, 415.

7. *People v. Weston*, 32 Cal. App. 571, 163 Pac. 691.

8. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

9. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Kramer*, 117 Cal. 647, 49 Pac. 842 (conversation between jurors); *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698 (it is misconduct to con-

verse with witness); *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130 (conversation with witness).

10. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

11. *People v. Weston*, 32 Cal. App. 571, 163 Pac. 691.

12. *People v. Kramer*, 117 Cal. 647, 49 Pac. 842.

13. *People v. West*, 73 Cal. 345, 14 Pac. 848.

counsel for defendant is present when this is done and no objection was made to it.¹⁴ It is misconduct for a sheriff to treat the jurors to liquor at his own expense, especially where he hopes to obtain the reward offered for defendant's conviction.¹⁵ Misconduct of a juror is ground for a new trial,¹⁶ but where the defendant does not object at the time to an act which he sees or knows, or at any time during the trial, or at the hearing of a motion for new trial, it is too late to make the misconduct the basis of an objection and exception after the court has disposed of the motion and pronounced judgment.¹⁷

§ 419. Consideration of Verdict.—Jurors must decide the guilt or innocence of a defendant upon the evidence introduced at the trial.¹⁸ They cannot act upon their personal knowledge of the facts.

“If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.”¹⁹

Jurors cannot be permitted to investigate the case and make experiments outside the courtroom.²⁰ They have no more right to receive or consider the opinions of other juries in prior trials of the cause than they have the opinions of other persons and the court may so instruct them.¹

14. *People v. Hite*, 135 Cal. 76, 67 Pac. 57.

15. *People v. Myers*, 70 Cal. 582, 12 Pac. 719.

The immediate agreement of the jury after receiving additional instructions requested by them is not misconduct. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650.

16. See *infra*, § 446.

17. *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

18. *People v. Conkling*, 111 Cal. 616, 44 Pac. 314.

19. Pen. Code, § 1120.

20. *People v. Conkling*, 111 Cal. 616, 44 Pac. 314.

1. *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.

Where the sex of persons in court is involved, it is not necessary to introduce evidence thereof, as the jury can determine this from their appearance.² But when the age of a person is an element of the offense, the jury should not be permitted to fix his age simply by viewing him while a witness upon the stand.³

The answer of a witness to a question put by the clerk of the court demanding his name is testimony and may be considered by the jury.⁴

Counseling together.—It is the duty of jurors, when deliberating upon their verdict, to counsel together and endeavor to agree upon a verdict if they can conscientiously do so.⁵ This is implied in the word “deliberation” in the code requirement that the jury retire for deliberation.⁶ While each juror must decide the matter for himself, he should do so only after a consideration of the case with his fellow-jurors. However, jurors are not required at all hazards to agree and to surrender their honest convictions for the mere purpose of agreeing upon a verdict.⁷ On the other hand, a juror should not hesitate to sacrifice his views when convinced they are erroneous, even though in so doing he defer to the views of the others.⁸

§ 420. Taking Articles and Papers to Jury-room.—The code provides that

“Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public

2. *People v. Fuski*, 32 Cal. App. Dec. 1038, 192 Pac. 552.

3. *People v. Leroy*, 33 Cal. App. Dec. 486, 194 Pac. 524.

4. *People v. Winters*, 49 Cal. 383.

5. *People v. Watson*, 165 Cal. 645, 133 Pac. 298; *People v. Whitlow*, 24 Cal. App. 1, 139 Pac. 826.

6. *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

7. *People v. Watson*, 165 Cal. 645, 133 Pac. 298; *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970.

8. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Verduzco*, 13 Cal. App. 789, 110 Pac. 970; *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."⁹

This code provision is not mandatory. It is not the absolute right of the prosecution or defense to have papers or instructions sent with the jury, unless the jury demand it.¹⁰

The history of the law relative to the taking of articles to the jury-room shows that this section of the code is not a limitation on the power of the court but an extension of the common-law rule touching exhibits containing writings.¹¹ The rule, therefore, is that the court may permit the jury to take with them and use in their deliberations any exhibit except depositions, where the circumstances call for it.¹² At least, any error in allowing exhibits to be taken to the jury-room is not ground for reversal if it does not appear that any use prejudicial to the defendant was made of them.¹³ Photographs, pictures, diagrams and other like fixed representations to the eye, may be taken to the jury-room under this rule and also upon the ground that they fairly come within the meaning of the word "papers." The fact that their presence in the jury-room might tend to unbalance the jury in their arguments is not of itself a sufficient reason for

9. Pen. Code, § 1137.

10. *People v. Cochran*, 61 Cal. 548 (cited in *Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722); *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389.

11. *People v. Balestieri*, 23 Cal. App. 708, 139 Pac. 821.

12. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Balestieri*, 28 Cal. App. 708, 139 Pac. 821; *People v. Barrett*, 22 Cal. App. 780,

136 Pac. 520. Compare *People v. Cochran*, 61 Cal. 548, where it is suggested that a diagram used only to illustrate the testimony of a witness is not "received in evidence" within the meaning of the code section.

13. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Herrera*, 32 Cal. App. 610, 163 Pac. 879; *People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520.

prohibiting the jury to take them to the jury-room.¹⁴ The reason for excluding depositions is obvious, as depositions may, and usually do, contain matters inadmissible in evidence which may have been eliminated from the consideration of the jury.¹⁵

It is error to allow the jury to take with them instructions which are refused.¹⁶ But the fact that they take the instructions to the jury-room and are thus acquainted with the parts stricken out by the court is not prejudicial when there is nothing in the modifications which could possibly have affected the minds of the jurors.¹⁷ The fact that some of the instructions are indorsed "Requested by the defendant and given" cannot be prejudicial to the defendant.¹⁸ If the instructions are oral, the fact that the jury request one code section to be reduced to writing does not make it incumbent upon the court to reduce the whole charge to writing and give it to the jury.¹⁹

§ 421. Return of Jury for Further Information.—Section 1138 of the Penal Code provides as follows:

"After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they wish to be informed on any point of law arising in the cause, they must require the officer to bring them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."²⁰

There was a similar provision in the Criminal Practice Act. While under such provisions the judge may restate the testimony of a witness at the request of the jury,¹ he

14. *People v. Balestieri*, 23 Cal. App. 708, 139 Pac. 821.

15. *People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520.

16. *People v. Cummings*, 57 Cal. 88.

17. *People v. Stephens*, 29 Cal. App. 616, 157 Pac. 570, 572.

18. *People v. Fisher*, 16 Cal. App. 271, 116 Pac. 688.

19. *People v. Zari*, 36 Cal. App. Dec. 56, 201 Pac. 345.

20. See *supra*, § 75, as to presence of defendant.

1. *People v. Ybarra*, 17 Cal. 166.

need not read testimony which the jury does not wish to hear.² If the circumstances require it, as where the request is made late at night and the reading will consume considerable time, the court may postpone the reading to a later time.³ And when in such case the jury return a verdict before the testimony is read, the defendant is not deprived of any substantial right, if there is no disposition on the part of the court to refuse the jury's request, and especially where the jury state they may be able to agree without the information.⁴ If it does not appear that there is any disagreement as to the testimony but only as to certain questions of law, it is not error to read the instructions rather than the testimony.⁵ And there is no impropriety in a judge having the reporter reread to him matter that escaped his ear although the jury did not request such rereading.⁶

In stating the evidence the judge may state the testimony from recollection, or read his own minutes, or a memorandum taken by another,⁷ or he may have the reporter read it. A slight mistake in reading the testimony is harmless where it relates to a matter as to which there is no good reason for supposing the jury had any doubts.⁸

Notice to and presence of counsel.—Before giving the information required, the defendant's counsel, if absent, should be notified.⁹ But if he cannot be found after search, the information may be given in his absence, if the defendant himself is present, and where the court directs an exception in defendant's behalf.¹⁰

2. *People v. Smith*, 3 Cal. App. 62, 84 Pac. 449.

3. *People v. Warren*, 130 Cal. 678, 63 Pac. 87. See *supra*, § 281, as to adjournments.

4. *People v. Warren*, 130 Cal. 678, 63 Pac. 87; *People v. Slaughter*, 33 Cal. App. 365, 165 Pac. 44.

5. *People v. Zentgraf*, 33 Cal. App. Dec. 190, 193 Pac. 274.

6. *People v. Eaton*, 6 Cal. Unrep. 906, 68 Pac. 583.

7. *People v. Boggs*, 20 Cal. 432.

8. *People v. Boggs*, 20 Cal. 432.

9. Pen. Code, § 1138; *People v. Trim*, 37 Cal. 274.

10. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

§ 422. **Instructions After Submission of Case.**—Section 1138 of the Penal Code declares the right of jurors to demand that they be reconducted into court for further instructions. This section does not affect or limit the inherent power of the court to cause the jury to be returned for further instructions.¹¹ This power may be exercised whenever the judge becomes convinced that he has not made the jury fully to understand a proposition of law or has omitted to state portions of the testimony proper to be stated,¹² or when he has inadvertently overlooked certain instructions.¹³ But under certain circumstances the giving of additional instructions may constitute error. For instance, when a case has been conducted on the theory that the defendant is on trial for the offense charged alone, it is error, after the jury have been out for several hours without being able to agree upon a verdict, and without any request on the part of the jury for additional information, to recall them and instruct them that they may return a verdict for an included offense. Such an instruction might be considered by the jury as an intimation of a desire by the court that the defendant be convicted of some offense.¹⁴ But of course no such intimation can be indulged when the jury requests further instructions.¹⁵

The court is required to give only such instructions as the jury ask for.¹⁶ A defendant is not entitled as a matter of right to have instructions read which the jury do not call for, or to have all the instructions on a given subject read when such as are read are satisfactory to the jury.¹⁷ It has been held that if, upon a suggestion by

11. *People v. Stouter*, 142 Cal. 75 Pac. 780; *People v. Garnett*, 29 Cal. 622.

12. *People v. Perry*, 65 Cal. 568, 4 Pac. 572.

13. *People v. Ponchette*, 30 Cal. App. 399, 158 Pac. 338.

14. *People v. Stouter*, 142 Cal. 146,

15. *People v. Grubb*, 24 Cal. App. 604, 141 Pac. 1051.

16. *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968.

17. *People v. Finali*, 31 Cal. App.

479, 160 Pac. 850.

a juror of a lack of comprehension of the instructions, the court rereads them, a failure of the defendant to request permission to question the juror further so as to ascertain the extent of his misunderstanding is a waiver of objection to his incompetency.¹⁸

§ 423. Urging Agreement.—When the jurors are unable to agree, it is proper for the presiding judge to admonish them of their duty to consult together, to listen to argument and to endeavor earnestly to reach an agreement, if possible.¹⁹ And, if no intimation is made as to how the verdict should go, it is not improper to urge the importance of reaching a verdict,²⁰ or to remind them of the expense of the trial and the desirability to them as taxpayers of avoiding a repetition of the expense.¹ But as such expressions are somewhat questionable² and hazardous, they are better left unsaid.³ It is improper, however, for a court to make any statement to the effect that the jury should convict upon the evidence.⁴ Such expressions are clearly objectionable as an intimation of the court's belief of the defendant's guilt,⁵ as tending to coerce the

18. *People v. Lee Gow*, 38 Cal. App. 248, 175 Pac. 917.

19. *People v. Carder*, 31 Cal. App. 355, 160 Pac. 686; *People v. Cherry*, 30 Cal. App. 285, 158 Pac. 335.

20. *People v. Miles*, 143 Cal. 636, 77 Pac. 666; *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935.

It is not unusual or objectionable for a judge to tell a jury at what time of night he is going home, so that they may know where he is available if they wish to call him during the night. *People v. Haacke*, 34 Cal. App. 516, 168 Pac. 382. See, generally, note, 10 A. L. R. 421, as to threat to dismiss jury in criminal case for term unless they could agree on verdict as coercion.

1. *People v. Miles*, 143 Cal. 636, 77 Pac. 666.

2. *People v. Carder*, 31 Cal. App. 355, 160 Pac. 686; *People v. Cherry*, 30 Cal. App. 285, 158 Pac. 335.

3. *People v. Miles*, 143 Cal. 636, 77 Pac. 666 (per McFarland, J., specially concurring), approved in *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511; and in *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935.

4. *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642; *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703.

5. *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511; *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852 (holding the error was not cured by an instruction that the

jury into returning a verdict.⁶ So also it is improper to characterize jurors who stand for acquittal as contrary jurors,⁷ or for the court to make any promise as to what it would or would not do in the event the defendant be found guilty.⁸

§ 424. Discharge Before Retirement of Jury Generally.

As to discharge of the jury the code provides as follows:

“The court may direct the jury to be discharged where it appears that it has not jurisdiction of the offense, or that the facts charged do not constitute an offense punishable by law.”⁹

“If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled.”¹⁰

A jury may also be discharged with the consent of the defendant, or upon the ground of legal necessity resulting from physical cause beyond the control of the court.¹¹ But the bare fact that a juror visited the scene of the crime is not a sufficient ground for the discharge of the jury.¹²

In case of the illness of a juror rendering him unable to perform his duty, the court may discharge the jury if satisfied, beyond a reasonable doubt, of the existence of the fact by the declarations of the invalid juror, the simple statements of his associates and his appearance before the

jury are the sole judges of all questions of fact); *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703.

6. *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694 (holding no improper influence was exerted); *People v. Vaughan*, 34 Cal. App. 16, 166 Pac. 1031.

7. *People v. Carder*, 31 Cal. App. 355, 160 Pac. 686.

8. *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511 (referring to cases from sister states where such a promise was held error).

9. Pen. Code, § 1113.

10. Pen. Code, § 1123. See *JURY* as to right of challenge in such case.

11. See *supra*, § 94.

12. *People v. Hope*, 62 Cal. 291.

court. It is not necessary to take testimony such as is required judicially to establish a controverted proposition.¹³

§ 425. Proceedings After Discharge for Want of Jurisdiction.—The code provides that “If the jury be discharged because the court has not jurisdiction of the offense charged, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged.”¹⁴ The code also prescribes the procedure to be followed in cases where the offense was committed within the exclusive jurisdiction of another county of the state. Speaking, generally, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only, provision is made for his admission to bail to insure a surrender upon a warrant for his arrest, if issued. In this connection the code prescribes the duty of the clerk in reference to the transmission of papers to the district attorney of the proper county, and makes provision for the payment of the expense incurred.¹⁵

“If the defendant is not arrested on a warrant from the proper county, as provided in section eleven hundred and fifteen, he must be discharged from custody, or his bail in the action is exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.”¹⁶

13. *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272.
14. Pen. Code, § 1114.

15. Pen. Code, § 1115.
16. Pen. Code, § 1116.

§ 426. Proceedings After Discharge Because Facts Do not Constitute Offense.—Section 1117 of the Penal Code provides, in part, that

“If the jury is discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment or information can be framed upon which the defendant can be legally convicted, in which case it may direct the district attorney to file a new information, or (if the defendant has not been committed by a magistrate) direct that the case be submitted to the same or another grand jury; . . . provided, that after such order or submission the defendant may be examined before a magistrate, and discharged or committed by him as in other cases.”¹⁷

Under this section it is not mandatory upon the court to direct the district attorney in the matter, nor does the power to cause a new information to be filed depend upon an order of the court so directing.¹⁸

§ 427. Discharge After Retirement of Jury.—It is provided by the code that

“If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged.”¹⁹

“Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily

17. *People v. Schmidt*, 64 Cal. 260, 30 Cal. 814.

18. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15.

19. Pen. Code, § 1139. See *infra*, § 439, discharge because of absence of juror when verdict is returned.

appears that there is no reasonable probability that the jury can agree."²⁰

In case of inability to agree.—While the code authorizes the discharge of a jury when it satisfactorily appears that there is no reasonable probability that the jury can agree,¹ this power should be exercised upon some kind of evidence,² and in accordance with established legal rules and sound legal discretion in the application of such rules to the facts and circumstances of each particular case.³ It should not be exercised until the court is satisfied beyond a reasonable doubt that an agreement is not probable.⁴ The statute does not provide just what proceeding shall be taken to determine the probability of an agreement. But there is perhaps no better method than to obtain from the jurors themselves an expression of their judgment,⁵ although the court is not bound to accept their statements as final.⁶ The unofficial statement of the sheriff is not evidence upon which the court can act.⁷ And although it is irregular to direct the sheriff to discharge the jury if they do not agree by a certain time, and such a procedure is not to be commended, nevertheless, such a discharge does not operate as an acquittal of the defendant.⁸

20. Pen. Code, § 1140.

1. *People v. Tong*, 155 Cal. 579, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 102 Pac. 263; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436. See *supra*, § 96, discharge as affecting question of jeopardy.

2. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

3. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272.

4. *Ex parte McLaughlin*, 41 Cal.

211, 10 Am. Rep. 272; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

5. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

6. *People v. Greene*, 100 Cal. 140, 34 Pac. 630.

7. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

8. *People v. Shotwell*, 27 Cal. 394.

Proceedings.—Where a jury cannot agree the court may adjudicate the fact, on a legal holiday,⁹ as the constitution does not in terms prohibit any legal business on holidays.¹⁰ The judgment of the court discharging a jury should be expressed in some form upon the record.¹¹ But the law does not require an express finding by the court that the jury could not agree and for that reason were discharged. It is sufficient if the record shows that the jury were unable to agree.¹²

VIII. VERDICT.

§ 428. *In General.*—Verdicts in criminal cases are of two kinds, general, and special.

“The jury has the power to find a general verdict, which includes questions of law as well as of fact.”¹³

“Or, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict.”¹⁴

It is optional with the jury to render a general or special verdict, and it is improper for the court to direct them what kind to render, although upon request of either party the court should direct them as to their discretion in the matter.¹⁵

When two or more offenses are charged in one indictment or information and separate trials thereof are not had, the defendant, as provided in the Penal Code, “may be convicted of any number of the offenses charged, and

9. *People v. Soto*, 65 Cal. 621, 4 Pac. 664; *People v. Lightner*, 49 Cal. 226. 140, 34 Pac. 630; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

10. *People v. Soto*, 65 Cal. 621, 4 Pac. 664. See *HOLIDAYS*.

11. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

12. *People v. Greene*, 100 Cal.

13. Pen. Code, § 1126; *People v. Verenseneekockcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

14. Pen. Code, § 1150.

15. *People v. Antonio*, 27 Cal. 404.

each offense upon which the defendant is convicted must be stated in the verdict."¹⁶ If such offense is sufficiently charged, and if evidence is introduced and instructions given as to each, the jury may return a general verdict,¹⁷ or bring in a separate verdict upon each count upon which the defendant may be convicted.¹⁸

Verdicts in criminal cases must be unanimous.¹⁹

§ 429. Statutory Forms of General Verdict.—The forms of general verdict are prescribed by the code as follows:

"A general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the indictment. Upon a plea of a former conviction or acquittal of the same offense, it is either 'for the people' or 'for the defendant.' When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be 'not guilty by reason of insanity.' When the defendant is acquitted on the ground of variance between the indictment and the proof, the verdict must be 'not guilty by reason of variance between the indictment and proof.'"²⁰

It is apparent from sections 1161 and 1404 of the Penal Code that it is not necessary for the jury to adhere to the form of verdict prescribed by section 1151 of that code. And a mere departure from the form prescribed does not of itself vitiate the verdict.¹

§ 430. Formal Requisites of General Verdict.—While a general verdict should be certain and definite, it is not necessary that the language of a verdict follow the strict

16. Pen. Code, § 954.

17. *People v. Peterson*, 17 Cal. App. 734, 121 Pac. 703. See *infra*, § 489.

18. *People v. Schwartz*, 43 Cal. App. 696, 185 Pac. 686.

19. *People v. Lee Gow*, 38 Cal. App. 248, 175 Pac. 917.

20. Pen. Code, § 1151.

1. *People v. McFadden*, 65 Cal. 445, 4 Pac. 421; *People v. Perdue*, 49 Cal. 425; *People v. McCarty*, 48 Cal. 557.

rules of pleading or be otherwise technical.² Although a verdict be informal, it is sufficient if the intention to convict the defendant of the crime charged or of a crime necessarily included therein be unmistakably expressed.³ A verdict must be read in the light of the facts disclosed by the record of the action,⁴ and it is the duty of the trial court to construe a verdict so as to give effect to the manifest intention of the jury, if that can be ascertained from its language considered in connection with the pleadings and evidence.⁵ In giving effect to the manifest intention of the jury, matters of surplusage⁶ and clerical errors⁷ will be disregarded.

Commencement.—Although written verdicts frequently commence, “We, the jurors, find,” it is not necessary that

2. *People v. Cornell*, 29 Cal. App. 430, 155 Pac. 1026 (quoting Bishop’s Criminal Procedure, § 1005a).

3. *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; *People v. Gilbert*, 57 Cal. 96 (holding sufficient a verdict in an embezzlement case finding “the defendant guilty, as indicted, to the sum of \$90”); *People v. Perdue*, 49 Cal. 425; *People v. McCarty*, 48 Cal. 557, holding sufficient a verdict, we “find a verdict of murder in the second degree.”

4. *People v. Hatch*, 163 Cal. 368, 125 Pac. 907; *People v. Tilley*, 135 Cal. 61, 67 Pac. 42 (stating that verdict must be read in connection with the plea of the defendant and the information); *People v. Wetzel*, 9 Cal. App. 223, 98 Pac. 549 (to the same effect as the *Tilley* case, *supra*); *People v. Morley*, 8 Cal. App. 372, 97 Pac. 84.

5. *People v. Hatch*, 163 Cal. 368, 125 Pac. 907 (holding sufficient a verdict finding the defendant guilty of embezzlement “as charged in the indictment and elected by the peo-

ple as the substantive offense to be proved herein”); *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; *People v. Sykes*, 10 Cal. App. 67, 101 Pac. 20; *People v. Morley*, 8 Cal. App. 372, 97 Pac. 84.

6. *People v. Holmes*, 118 Cal. 444, 50 Pac. 675 (where there was a verdict of “involuntary manslaughter, not a felony”); *People v. Joshinsky*, 106 Cal. 638, 39 Pac. 1077; *People v. Ah Kim*, 34 Cal. 189; *People v. Brady*, 6 Cal. Unrep. 719, 65 Pac. 823 (where the verdict was guilty in the first degree “for burglary”); *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271 (where a form of verdict submitted to the jury designated the prison); *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858; *People v. Owens*, 3 Cal. App. 750, 86 Pac. 980 (holding that a verdict, guilty of assault “with a deadly weapon” with intent to commit murder, is not vitiated by the quoted words).

7. *People v. Brady*, 6 Cal. Unrep. 719, 65 Pac. 823 (where the verdict was guilty of “burglary”).

they do so. A verdict is sufficient which is simply "Guilty," or "Guilty as charged." So also a verdict is sufficient which states, "We, the jury, agree that the defendant is guilty." When the jury "agree" they "find" if they return their agreement into court.⁸

§ 431. Responsiveness.—The verdict must be responsive to the averments of the information and the pleas interposed by the defendant. A jury cannot legally convict a defendant of an offense other than that charged against him or necessarily included therein, even though it may have been proved upon the trial.⁹ When several pleas are interposed the jury should find upon all of them. There must be a verdict upon a plea of former acquittal, or conviction, or once in jeopardy, as well as upon the plea of not guilty, before there can be a judgment of conviction,¹⁰ unless the pleas as made and entered are not in substantial compliance with the code.¹¹ But where the same facts are relied upon to support a plea of once in jeopardy and of former acquittal, a finding upon one necessarily includes a finding upon the other.¹²

§ 432. Designation of Defendant.—There is no necessity for prefixing the title of the action to the verdict and it may be rejected as surplusage.¹³ And when only one person is being tried, it is unnecessary for the jury to give

8. *People v. Buckley*, 49 Cal. 241.

9. *People v. Arnett*, 126 Cal. 680, 59 Pac. 204; *People v. Murat*, 45 Cal. 281; *People v. Akens*, 25 Cal. App. 373, 143 Pac. 795 (holding that verdict of guilty of assault with intent to rape without the scope of an information charging rape upon female under age of consent). See *INDICTMENT AND INFORMATION*, as to effect of variance.

10. *People v. Tucker*, 115 Cal. 337, 47 Pac. 111; *People v. Ham-*

berg, 84 Cal. 468, 24 Pac. 298; *People v. Fuqua*, 61 Cal. 377; *People v. Helbing*, 59 Cal. 567; *People v. Kinsey*, 51 Cal. 278; *Ex parte King*, 10 Cal. App. 282, 101 Pac. 810. See *infra*, § 574.

11. *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856; *Id.*, 3 Cal. Unrep. 102, 22 Pac. 24.

12. *People v. Wilkison*, 30 Cal. App. 473, 158 Pac. 1067.

13. *People v. Ah Kim*, 34 Cal. 189.

his name. Consequently, the name of the defendant may be rejected as surplusage, and any error in his middle name is immaterial.¹⁴ But if the jury find another person, not being tried, to be guilty of the crime, the verdict is in effect a finding that the defendant being tried is not guilty, and judgment should be rendered in his favor, if the jury is not directed to reconsider their verdict.¹⁵

“On an indictment or information against several, if the jury cannot agree upon a verdict as to all, they must render a verdict as to those in regard to whom they do agree, on which judgment must be entered accordingly, and the case as to the others may be tried by another jury.”¹⁶

The verdict on a joint trial must show which defendants are convicted and which acquitted. A finding that “the defendant” is guilty without specifying which is void for uncertainty.¹⁷

§ 433. Specification of Offense Generally.—A good verdict of conviction must determine the offense of which an accused is found guilty,¹⁸ and must contain either in itself or by reference to the indictment or information all the elements of the crime,¹⁹ or it will not support a judgment. When an indictment or information contains but one count charging a single offense, a general verdict of “guilty”²⁰ or of “guilty as charged,”²¹ which does not

14. *People v. Boggs*, 20 Cal. 432.

15. *People v. Ah Ye*, 31 Cal. 451.

16. Pen. Code, § 1160.

17. *People v. Sepulveda*, 59 Cal. 342, distinguished in *Willard v. Archer*, 63 Cal. 33; *People v. Salazar*, 2 Cal. Unrep. 119.

18. *People v. Ah Gow*, 53 Cal. 627 (holding that a verdict finding the defendant guilty “of the indictment as charged to him” is insufficient).

19. *People v. Cummings*, 117 Cal. 497, 49 Pac. 576.

20. *People v. Jochinsky*, 106 Cal. 638, 39 Pac. 1077; *People v. West*, 73 Cal. 345, 14 Pac. 848; *People v. March*, 6 Cal. 543; *People v. Brady*, 6 Cal. Unrep. 719, 65 Pac. 823.

21. *People v. Millan*, 106 Cal. 320, 39 Pac. 605 (holding in a prosecution for obtaining money by false pretenses a verdict of “guilty as charged” is not defective because it does not state the amount of the money obtained); *People v. Perez*, 87 Cal. 122, 25 Pac. 262; *People v. De Cleer*, 60 Cal. 332; *People v.*

undertake to set out the facts found, imports a conviction of the offense charged, and is sufficient in form and substance, in a case where the crime charged is not divided into degrees. It is sufficient even when the crime charged includes lesser offenses, of which a defendant might be convicted.² Where the accusatory pleading contains a number of specifications of misconduct, and a plea of guilty is interposed, an unqualified verdict of guilty is as specific as the plea and is sufficient.³

A general verdict of conviction need not specify the county in which the offense was committed.⁴

§ 434. Particular Specification of Offense.—Where the statute in a word specifies and defines the crime, it is sufficient for the verdict so to specify it. Thus, it is sufficient for the verdict to find the defendant guilty of “forgery”⁵ or of “manslaughter.”⁶ But when the statute does not define the crime except as the specially forbidden acts define it, a verdict is insufficient which neither refers to the information nor contains a recital of the inhibited acts.⁷ If the verdict specifically refers to the accusatory pleading, the omission of an essential element from the specification of the offense is not fatal.⁸ But if the verdict does not contain such a reference, there is no room

Keach, 28 Cal. App. 194, 151 Pac. 747 (holding in a prosecution for obtaining money by false pretenses, that a finding as to the value of the property in addition to a finding of guilty as charged is surplusage); *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572; *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858.

2. *People v. Gilbert*, 60 Cal. 108; *People v. March*, 6 Cal. 543.

3. *Matter of Accusation of Shepard*, 161 Cal. 171, 118 Pac. 513.

4. *People v. Jochinsky*, 106 Cal. 638, 39 Pac. 1077. See *VENUE*.

5. *People v. Somsy*, 31 Cal. App.

Dec. 630, 189 Pac. 456 (per Richards, J., stating and distinguishing the rules).

6. *People v. Tilley*, 135 Cal. 61, 67 Pac. 42 (not involving manslaughter, but stating the general rule).

7. *People v. Somsy*, 31 Cal. App. Dec. 630, 189 Pac. 456.

8. *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845 (where a verdict guilty “of the crime of lewd and lascivious conduct with [the body of] a male child,” etc., omitted the words inclosed by brackets).

for inference outside of the words of the verdict. These must express the intention unequivocally; otherwise the verdict is insufficient.⁹ Such a verdict of this general character is not a special verdict,¹⁰ but is undoubtedly intended as a general verdict, and the question as to its sufficiency is to be determined as such.¹¹ While it is ordinarily true that a general verdict is to be construed in connection with the information and plea,¹² it is expressly provided in the Penal Code that

“No judgment of conviction can be given, unless the jury expressly finds against the defendant upon the issue.”¹³

9. *People v. Tilley*, 135 Cal. 61, 67 Pac. 42 (where a verdict of guilty of “receiving stolen property” was returned); *People v. Cummings*, 117 Cal. 497, 49 Pac. 576 (where the verdict found defendant guilty of defrauding another of a note “in the indictment mentioned,” the reference being held merely a reference fixing the identity of the note); *People v. Ah Gow*, 53 Cal. 627 (where it was held that a verdict that “We, the jury, do find the defendant guilty of the indictment as charged to him,” was insufficient; *Ex parte Max*, 44 Cal. 579 (assault with deadly weapon); *Ex parte Ah Cha*, 40 Cal. 426 (assault with deadly weapon); *People v. Wilson*, 9 Cal. 259 (assault with deadly weapon); *People v. Vanard*, 6 Cal. 562 (assault with deadly weapon); *People v. Somskey*, 31 Cal. App. Dec. 630, 189 Pac. 456; *People v. Small*, 1 Cal. App. 320, 82 Pac. 87 (a verdict guilty of “obtaining money under false pretenses” is insufficient). Compare *People v. McFadden*, 65 Cal. 445, 4 Pac. 421, holding a verdict suffi-

cient which finds the defendant guilty of “an assault to murder.” See *State v. Schweitzer*, 18 Idaho, 609, 111 Pac. 130, distinguishing *People v. Tilley*, 135 Cal. 61, 67 Pac. 42, and holding that in a verdict “guilty (of selling by short weights) as charged in the complaint,” the words inclosed by parentheses may be treated as surplusage and the verdict upheld.

The verdict would be insufficient even though it specifies that the defendant is “guilty of a felony,” for it is not the province of the jury to determine the legal definition of the acts claimed to constitute a crime. *People v. Small*, 1 Cal. App. 320, 82 Pac. 87.

10. *People v. Small*, 1 Cal. App. 320, 82 Pac. 87.

11. *People v. Tilley*, 135 Cal. 61, 67 Pac. 42 (a fortiori, the verdict must be so regarded, if it be susceptible of a different construction than that of guilty of the crime charged).

12. See *supra*, § 430.

13. Pen Code, § 1162.

While the verdict must find all the essentials of the crime, it need not go further and contain findings which are not essential in an indictment. This rule is instanced in many of the cases involving assault with a deadly weapon.¹⁴ Since it is sufficient in an indictment to follow the language of the statute charging the offense,¹⁵ by parity of reasoning it is sufficient for the jury in its verdict to follow the language of the charge;¹⁶ and, as in the case of an indictment, it is not necessary for the jury to use the exact language of the statute, if words of equivalent import are used.¹⁷

§ 435. Specification of Degree of Offense.—Section 1157 of the Penal Code provides that

“Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.”

The Criminal Practice Act contained a similar provision as applied to the crime of murder.¹⁸

These provisions are mandatory,¹⁹ and so, if the degree is not specified, when required, the verdict is insufficient, as it cannot be assumed that the jury designed, from a general finding of guilty as charged, to fix the grade of

14. *Ex parte Mitchell*, 70 Cal. 1, 11 Pac. 488; *People v. Turner*, 65 Cal. 540, 4 Pac. 553; *People v. English*, 30 Cal. 214; *People v. Vanard*, 6 Cal. 562.

15. See INDICTMENT AND INFORMATION.

16. *People v. Turner*, 65 Cal. 540, 4 Pac. 553.

17. *People v. Congleton*, 44 Cal. 92 (holding a verdict of “guilty of an assault with a deadly weapon with intent to do bodily harm on the person” of another, was sufficient); *People v. Congleton*, 44 Cal. 92.

18. *People v. Campbell*, 40 Cal. 129.

19. *People v. Jochinsky*, 106 Cal. 638, 39 Pac. 1077; *People v. Cornwell*, (Cal.), 35 Pac. 566; *People v. Banister*, 4 Cal. Unrep. 333, 34 Pac. 710; *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776; *People v. O’Neil*, 78 Cal. 388, 20 Pac. 705; *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *People v. Barnhart*, 59 Cal. 381; *People v. Coch*, 53 Cal. 627 (arson); *People v. Campbell*, 40 Cal. 129 (murder); *People v. Marquis*, 15 Cal. 38 (murder). See *infra*, § 475, as to the rule where a plea of guilty is entered.

the crime.²⁰ It is unnecessary for the jury to specify the degree when the indictment or information charges only the lowest degree of a crime.¹ But when a higher degree of crime is charged, it is the duty of the jury, if they find the defendant guilty, to determine the degree, even when the crime is alleged to have been committed under such circumstances that the defendant can be lawfully convicted of one degree of the crime only,² or when the court advises the jury that they can convict of one degree only.³ The reason for this becomes apparent when it is borne in mind that the severity of the punishment depends upon the degree of guilt.⁴ It is not error to render a verdict of "larceny in the [first or] second degree," as the code expressly states that there are two degrees of larceny.⁵ But since there are no degrees of grand larceny, when a defendant is charged therewith, the jury need not find the degree.⁶

§ 436. Assessment of Punishment—Recommendation to Mercy.—Except in certain homicide and rape cases,⁷ ordinarily the jurors have nothing to do with the punishment of the crime.⁸ Consequently, except where authorized by statute, a recommendation of the prisoner to the mercy of the court constitutes no part of the verdict and may be rejected as surplusage.⁹ Such a recommendation is ad-

20. *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *People v. Marquis*, 15 Cal. 38.

1. *People v. Fisher*, 51 Cal. 319.

2. *People v. Campbell*, 40 Cal. 129 (where the indictment charged a murder perpetrated by means of poison).

3. *People v. Cornwell* (Cal.), 35 Pac. 566; *People v. Bannister*, 4 Cal. Unrep. 333, 34 Pac. 710.

4. *People v. Bannister*, 5 Cal. Unrep. 333, 34 Pac. 710.

5. *People v. Righetti*, 66 Cal. 184, 4 Pac. 1185.

6. *People v. Perez*, 87 Cal. 122, 25 Pac. 262; *People v. Manners*, 70 Cal. 428, 11 Pac. 643; *People v. Price*, 67 Cal. 350, 7 Pac. 745; *People v. Whitely*, 64 Cal. 211, 27 Pac. 1104; *People v. Smith*, 2 Cal. Unrep. 215.

7. See *supra*, § 411.

8. *People v. Dice*, 120 Cal. 189, 52 Pac. 477; *People v. Buelna*, 1 Cal. Unrep. 32.

9. *People v. Sykes*, 10 Cal. App. 67, 101 Pac. 20.

dressed solely to the trial court, and there is no error in directing the verdict to be entered without it.¹⁰ In the case of murder in the first degree the jury have a discretion to declare that the defendant shall suffer death or confinement in the state prison for life.¹¹ While the jury need not declare what punishment shall be imposed,¹² when they do so, they have no power to designate the particular prison in which the defendant shall be confined, as the statute confers upon them no such authority.¹³

§ 437. Special Verdict—The Penal Code provides as follows:

“A special verdict is that by which the jury find the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.”¹⁴

“The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged.”¹⁵

“The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury.”¹⁶

The code prescribes the manner of giving judgment upon a special verdict, whether upon a plea of not guilty, or of former conviction or acquittal.¹⁷ And it is provided that if the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the

10. *People v. Lee*, 17 Cal. 76.

11. Pen. Code, § 190.

12. *People v. Welch*, 49 Cal. 174,
on rehearing; *People v. Hurtado*,
2 Cal. Unrep. 206.

13. *People v. Stein*, 23 Cal. App.
108, 137 Pac. 271.

14. Pen. Code, § 1152; *People v.*
Cornell, 29 Cal. App. 430, 155 Pac.
1026.

15. Pen. Code, § 1153.

16. Pen. Code, § 1154. See *infra*,
§ 438, as to submitting forms.

17. See Pen. Code, § 1155.

evidence of facts merely, and not the conclusions of fact, from the evidence, as established to their satisfaction, the court must order a new trial.¹⁸

If the finding of the jury be consistent with a verdict of guilty or of not guilty, it does not constitute a special verdict as that term is used in the statute. In other words, the finding must embrace all the material facts charged in the information, or it is insufficient, and the court need not receive it, but may direct the jury to reconsider it.¹⁹

§ 438. Submitting Forms.—Since the jury are presumed to be able to formulate their own conclusions, the law does not impose upon a trial judge the duty of furnishing them with forms of verdict which may be rendered.²⁰ But a judge may do so if he chooses,¹ in which case he should submit forms for every verdict which may properly be rendered. The court need not submit a form for a verdict of conviction of included offenses, when a conviction thereof is not authorized,² especially in the absence of a request for such a form.³ And in any case the failure to submit such a form is not error.⁴ If the forms are read to the jury, the order of reading is immaterial.⁵

§ 439. Rendition, Reception and Recordation.—The following provisions of the code relate to the reception of the verdict and the procedure thereupon:

18. See Pen. Code, § 1156.

19. *People v. Bowman*, 24 Cal. App. 781, 142 Pac. 495. See *infra*, § 440.

20. *People v. Hill*, 116 Cal. 562, 48 Pac. 711.

1. *People v. Robinson*, 65 Cal. 136, 3 Pac. 607.

2. *People v. Barrios*, 35 Cal. App. Dec. 111, 199 Pac. 58 (where

burglary in the night-time was charged).

3. *People v. Miller*, 177 Cal. 404, 170 Pac. 817; *People v. Worden*, 113 Cal. 569, 45 Pac. 844.

4. *People v. Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652; *People v. Hill*, 116 Cal. 562, 48 Pac. 711.

5. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596.

"When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried."⁶

"When the jury appear they must be asked by the court, or clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same."⁷

"When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case."⁸

The Criminal Practice Act contained similar provisions. Trial judges should follow these provisions strictly,⁹ although mere irregularities which do not prejudice the rights of the defendant do not require a reversal.¹⁰ If a written verdict is brought in it should be read or declared before it is recorded,¹¹ as it is the right of either party, when a verdict is rendered and before it is recorded, to request that the jury be polled.¹² The verdict should then be recorded. However, it is not necessary for the clerk to enter it in the minute-book before the jury is discharged. If he makes rough minutes of the verdict and reads it to the jury, it is sufficient.¹³ While it is irregular to read the written verdict itself and discharge the jury before recordation, the irregularity is not prejudicial.¹⁴

6. Pen. Code, § 1147; *People v. Rodundo*, 44 Cal. 538.

7. Pen. Code, § 1149. See *supra*, § 75 (presence of defendant).

8. Pen. Code, § 1164.

9. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Nichols*, 62 Cal. 518.

10. See *infra*, § 597.

11. *People v. Nichols*, 62 Cal. 518.

12. See *infra*, this section.

13. *People v. Smith*, 59 Cal. 601; *People v. Gilbert*, 57 Cal. 96.

14. *People v. Gilbert*, 57 Cal. 96.

Section 1163 of the Penal Code prescribes the time and manner of polling the jury, the purpose of this provision being to make a record of the assent of each juror to the verdict rendered. When the jury is polled, they must be severally asked whether it is their verdict, and if anyone answer in the negative, the jury must be sent out for further deliberation. It is a sufficient compliance with this code provision to read the verdict and ask each juror the question, "Is this your verdict?" At all events, unless the defendant objects to the mode of polling the jury, he cannot complain that each juror was not called upon and required to state the verdict in his own language or that the verdict should have been read to each juror separately when asked, "Is this your verdict?"¹⁵

§ 440. Amendment and Reconsideration.—In reference to the reconsideration of the verdict of a jury, the code provides as follows:

"When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court cannot require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or find the facts specially and leave the judgment to the court."¹⁶

"If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is

15. *People v. Lopez*, 21 Cal. App. 188, 131 Pac. 104. *Bowman*, 24 Cal. App. 781, 142 Pac. 495.

16. Pen. Code, § 1161; *People v.*

found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict."¹⁷

If the form of the verdict is irregular, the court may, before the verdict is finally accepted or the jury discharged, or at any time while the jury are before it and under its control, direct them to return the verdict in such form that judgment can be pronounced thereon.¹⁸ Thus a jury should be sent out for further deliberation if a verdict is returned convicting the defendant of a crime not embraced in the pleadings,¹⁹ if it fixes a term of imprisonment,²⁰ or if it does not specify the degree of guilt, when required,¹ or if it is otherwise informal.² But with the assent of the jury to the verdict and their discharge, the functions of the jury with respect to the case cease. The court cannot thereafter alter it, or call the jury to alter or amend it.³ When informalities in a verdict amount to mere matters of form, the court, instead of directing the jury to retire for that purpose, may of its own motion order the verdict to be corrected.⁴

When the jury are directed to reconsider their verdict, it is not necessary for them to retire to the jury-room for that purpose, if they have anticipated the action of the court and have already agreed upon a verdict proper in form.⁵ They may proceed in open court to find a proper verdict.⁶

17. Pen. Code, § 1162.

18. *People v. Curtis*, 76 Cal. 57, 17 Pac. 941; *People v. Jenkins*, 56 Cal. 4; *People v. Dick*, 34 Cal. 663.

19. *People v. Curtis*, 76 Cal. 57, 17 Pac. 941.

20. *People v. Taylor*, 4 Cal. App. 31, 87 Pac. 215.

1. *People v. Marquis*, 15 Cal. 38.

2. *People v. Holmes*, 118 Cal. 444, 50 Pac. 675 (where the jury returned a verdict guilty of "involun-

tary manslaughter, not a felony"); *People v. Ah. Gow*, 53 Cal. 627, where the verdict was "guilty of the indictment as charged to him [defendant]."

3. *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776 (explaining *Blum v. Pate*, 20 Cal. 69).

4. *People v. Jenkins*, 56 Cal. 4.

5. *People v. Bowman*, 24 Cal. App. 781, 142 Pac. 495.

6. *People v. Laverty*, 9 Cal. App. 756, 100 Pac. 899.

§ 441. Proceedings After Verdict.—The following code provisions relate to the discharge or detention of a defendant following the verdict:

“If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the pleading and proof, which may be obviated by a new indictment or information, the court may order his detention, to the end that a new indictment or information may be preferred. . . . ”⁷

“If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail he may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed his bail is exonerated, or if money is deposited instead of bail it must be refunded to the defendant.”⁸

“If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list of the county, to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the district attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the sheriff to the state insane asylum. If the jury find the defendant sane he shall be discharged.”⁹

In the case of a variance, the failure of the court to order the detention of the defendant, as provided by section 1165 of the Penal Code, does not prevent the filing of a new and proper information.¹⁰

7. Pen. Code, § 1165.

9. Pen. Code, § 1167.

8. Pen. Code, § 1166.

10. People v. Allen, 61 Cal. 140.

R. PROCEEDINGS AFTER TRIAL AND BEFORE JUDGMENT.

I. NEW TRIAL.

§ 442. **In General.**—"A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given."¹¹ Speaking generally, the object and purpose of a retrial is to enable the trial court to avoid the errors and irregularities claimed to have occurred on the former trial to the prejudice of defendant's rights,¹² or to enable the defendant to present newly discovered evidence.¹³ The remedy is statutory, and it is within the exclusive province of the legislature to determine whether or not the remedy shall exist in any class of cases, and if so, upon what grounds.¹⁴ The grounds upon which a new trial may be granted, are enumerated in section 1181 of the Penal Code, which expressly excludes all other grounds.¹⁵ There is at least one and perhaps two exceptions to this statement. Section 1202 of the Penal Code provides that a defendant is entitled to a new trial if the time for pronouncing judgment be extended beyond the period limited therefor by section 1191 of the Penal Code.¹⁶ And it is provided by statute that a new trial may be granted in case of loss or destruction by a public calamity of a proposed bill of exceptions or statement of the case on motion for new trial pending at the time, when no other record of the proceeding can be

11. Pen. Code, § 1179.

12. *People v. Turner*, 39 Cal. 370.

13. See *infra*, § 452 et seq.

14. *People v. Amer*, 151 Cal. 303, 96 Pac. 401. See *infra*, § 445, as to when application for new trial must be made.

15. *People v. Amer*, 151 Cal. 303, 90 Pac. 698; *People v. Simmons*,

119 Cal. 1, 50 Pac. 844; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Voll*, 43 Cal. 166; *People v. Fair*, 43 Cal. 137; *People v. Bernstein*, 18 Cal. 699 (under the Practice Act). See *infra*, § 443, for the provisions of section 1181 of the Penal Code.

16. See *infra*, § 470.

obtained.¹⁷ Whether or not this statute applies to criminal proceedings has not been decided. However this may be, the statute does not apply where the motion for new trial has been determined and an appeal is taken.¹⁸

§ 443. Particular Grounds.—The Penal Code provides that when a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial in the following cases:

“1. When the trial has been had in his absence, if the indictment is for a felony”;¹⁹

“2. When the jury has received any evidence out of court other than that resulting from a view of the premises”;²⁰

“3. When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented”;¹

“4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors”;²

17. Stats. 1907, p. 998.

18. *People v. Napoli*, 7 Cal. App. 79, 93 Pac. 500.

19. Pen. Code, § 1181, subd. 1; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362 (holding that a new trial will not be granted because of the absence of the defendant at the trial of his codefendant or at the time of the granting of a continuance of defendant's trial); *People v. Miller*, 33 Cal. 99 (under the Criminal Practice Act).

20. Pen. Code, § 1181, subd. 2. See *supra*, § 311 et seq., as to view by jury, and see *infra*, § 451, as to reception of evidence out of court.

1. Pen. Code, § 1181, subd. 3.

See *infra*, § 446 et seq., as to misconduct of jury; and *infra*, § 449 et seq., as to separation of jury.

2. Pen. Code, § 1181, subd. 4. See *infra*, § 457, as to proof of misconduct of jury.

A new trial cannot be granted under this provision on account of the illness of a juror, not so severe as to incapacitate him from performing his duties. But it has been suggested that possibly in an extreme case it might be that the insanity of a juror occurring during the trial might by necessity be held a “means” within this provision: *People v. Brown*, 76 Cal. 573, 18 Pac. 678.

"5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial";³

"6. When the verdict is contrary to law or evidence";⁴

"7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence, have discovered and produced on the trial."⁵

The statutory provisions as to new trials in criminal cases in force under the Criminal Practice Act were substantially the same as the present provisions under the code, except that originally newly discovered evidence was not specified as one of the grounds, that having been subsequently added by amendment.⁶

Matters not affording ground for new trial.—The incompetency of a trial juror is not ground for a new trial and cannot be urged for the first time upon a motion therefor,⁷ even though such disqualification was unknown until after trial.⁸ So also a new trial cannot be granted upon the following grounds: irregularity in the manner of impaneling the trial jury,⁹ error in denying a motion to set

3. Pen. Code, § 1181, subd. 5. See supra, § 444, as to errors of law occurring at or prior to trial.

4. Pen. Code, § 1181, subd. 6. See supra, § 445.

5. Pen. Code, § 1181, subd. 7 (in part). See infra, §§ 452-454.

6. *People v. Amer*, 151 Cal. 303, 90 Pac. 698 (citing *People v. Bernstein*, 18 Cal. 699, decided under the Criminal Practice Act). See cases cited supra, decided under Criminal Practice Act.

7. *People v. McFarlane*, 138 Cal. 481, 489, 61 L. R. A. 245, 71 Pac. 568, 72 Pac. 48; *People v. Evans*, 124 Cal. 206, 56 Pac. 1024; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Samsela*, 66 Cal. 99, 4 Pac. 1061; *People v. Mortier*, 58 Cal.

262; *People v. Mortimer*, 46 Cal. 114 (citing both Code and Criminal Practice Act); *People v. Fair*, 43 Cal. 137 (decided under the Criminal Practice Act and overruling *People v. Plummer*, 9 Cal. 298); *People v. Chung Lit*, 17 Cal. 320 (under the Criminal Practice Act); *People v. Duncan*, 8 Cal. App. 186, 96 Pac. 414; *People v. Emmons*, 7 Cal. App. 685, 701, 95 Pac. 1032.

8. *People v. Boren*, 139 Cal. 210, 72 Pac. 899; *People v. Fair*, 43 Cal. 137; *People v. Chung Lit*, 17 Cal. 320 (under the Criminal Practice Act); *People v. Duncan*, 8 Cal. App. 186, 197, 96 Pac. 414.

9. *People v. Voll*, 43 Cal. 166 (under the Criminal Practice Act); *People v. Coffman*, 24 Cal. 230 (under the Criminal Practice Act).

aside an indictment,¹⁰ misconduct of the district attorney unaccompanied by any error of the trial court,¹¹ or premature adjournment of the court by the sheriff because of the absence of the judge.¹² In a case where a motion for a new trial was based on the ground that a substituted attorney was unfamiliar with the case, it has been held not improper to deny the motion, no request for a continuance having been made, and it being assumed from the record that all the rights of the defendant were safeguarded.¹³ The temporary absence of the officer having charge of the jury is not ground for a new trial if it appears that the jury were not allowed to separate, and that no one spoke to a juror concerning the trial.¹⁴ And a new trial will not be granted because the officer in charge of the jury made remarks expressing his belief in defendant's guilt, if it is shown that no juror heard them or had knowledge thereof.¹⁵ Likewise, repeated publications in the newspapers arousing public feeling to bitter hostility against a defendant do not constitute ground for a new trial, at least, where it does not appear that it prevented a fair and impartial trial, and resulted in intimidation of the witnesses for the defendant so that they refused to testify or gave colorless testimony.¹⁶ If an informal verdict amounts to an acquittal, the remedy of the defendant is not by motion to set it aside, but for judgment of acquittal upon the verdict found.¹⁷ While

10. *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

11. *People v. Amer*, 151 Cal. 303, 90 Pac. 698. See *infra*, § 445.

12. *People v. Shainwald*, 51 Cal. 468.

13. *People v. Malone*, 32 Cal. App. Dec. 729, 191 Pac. 1113.

14. *People v. Kelly*, 46 Cal. 355; *People v. Hughes*, 29 Cal. 257; *People v. Boggs*, 20 Cal. 432; *People v. Stock*, 34 Cal. App. Dec. 1030, 198 Pac. 418 (but stating that con-

duct of the officer who disregards his oath and fails in the performance of his duty might, if not explained so as to show that the defendant was not prejudiced thereby, be an irregularity that would afford ground for a new trial).

15. *People v. Babcock*, 160 Cal. 537, 117 Pac. 549.

16. *People v. Durrant*, 116 Cal. 179, 223, 48 Pac. 75, 10 Am. Cr. Rep. 499.

17. *People v. Ah Ye*, 31 Cal. 451.

accident or surprise, which ordinary prudence could not have guarded against, is a ground for new trial in civil actions, this ground is not enumerated in the Penal Code.¹⁸

§ 444. Errors of Law Occurring at and Prior to Trial.—

It has been held that every step taken after an issue of fact joined for the purpose of a determination of that issue, in the court where the cause is pending, up to and including the verdict upon that issue must be regarded as a step or proceeding "arising during the course of the trial," within the meaning of this statutory provision.¹⁹ Hence, a new trial may be granted if there are errors in the admission or exclusion of evidence,²⁰ or in the giving or refusal of instructions, or if oral instructions are given contrary to the statute,¹ or where there has been misconduct of the district attorney, and this is accompanied by an error of the court in failing to check it.² But a motion for a new trial cannot properly be based upon any objection to the sufficiency or validity of the indictment, or upon any errors or irregularities occurring in the proceedings before issue of fact joined.³ Affidavits setting forth proceedings at the preliminary examination and a charge to the grand jury, in no respect connected with the trial or brought to the knowledge of the jurors, are irrelevant and will not be considered in support of a motion

18. See Code Civ. Proc., § 657, subd. 3, and see, generally, *NEW TRIAL*. Compare *People v. Jocelyn*, 29 Cal. 562, decided under the Criminal Practice Act, and holding that a new trial will not be granted in a criminal case on the ground of surprise by the testimony of a witness unless the affidavit shows that the testimony of the witness was untrue, or that the defendant could have obviated it by other testimony if a continuance had been granted or a new trial had.

19. See *supra*, § 443, for the word-

ing of subdivision 5 of section 1181 of the Penal Code, being substantially the same as originally enacted in the Criminal Practice Act. *People v. Turner*, 39 Cal. 370.

20. *People v. Amer*, 151 Cal. 303, 90 Pac. 698 (but holding the admission of immaterial evidence is not ground for new trial).

1. *People v. Ah Fong*, 12 Cal. 345 (under the Criminal Practice Act).

2. See *infra*, § 445.

3. *People v. Turner*, 39 Cal. 370 (under the Criminal Practice Act).

for new trial.⁴ It seems, however, a failure to secure the plea of a defendant to an indictment or information prior to putting him on trial is a ground for new trial,⁵ unless the trial was conducted in all respects as though a plea had been formally entered.⁶

§ 445. Verdict Contrary to Law or Evidence.—The provision for a new trial “when the verdict is contrary to law or evidence,”⁷ has to do solely with the verdict as rendered, and not to the causes that may have operated to produce the verdict. The sole questions thereunder are as to whether the verdict is sustained by the evidence admitted, and as to whether it is opposed to the law applicable to the case. A verdict is contrary to the evidence only when the evidence introduced upon the trial does not warrant the conclusion reached by the jury. And it is contrary to the law only when it is opposed to the law applicable to the case, in the light of the evidence received by the court upon the trial. The words “contrary to law” as here used mean no more than the words “against law” found in the corresponding section of the Code of Civil Procedure, and it includes no case falling within any other subdivision of section 1181 of the Penal Code.⁸ A verdict, therefore, is not contrary to law simply because there has been misconduct on the part of the district attorney, however prejudicial. But if such misconduct is accompanied by an error of court, it may be made the basis of a motion for a new trial, as an error in the decision of a question of law.⁹

4. *People v. Owens*, 3 Cal. App. 750, 86 Pac. 980.

5. *People v. Corbett*, 28 Cal. 328 (under the Criminal Practice Act).

6. *People v. Tomskey*, 20 Cal. App. 672, 130 Pac. 184.

7. See *supra*, § 443, for Pen. Code, § 1181, subd. 6; *People v. Kennedy*, 7 Cal. Unrep. 184, 75 Pac. 845.

8. *People v. Amer*, 151 Cal. 303, 90 Pac. 698. See Code Civ. Proc., § 657, subd. 6, referred to in the *Amer* case, *supra*.

9. *People v. Amer*, 151 Cal. 303, 90 Pac. 698 (limiting *People v. Sing Lee*, 145 Cal. 190, 78 Pac. 636, and overruling *People v. San- some*, 98 Cal. 235, 33 Pac. 202).

A new trial should not be granted a defendant except for some omission or error prejudicial to him. It cannot, therefore, be granted on the ground that the verdict was too favorable to him; as, for example, on the ground that the verdict is for a lesser degree of crime than the evidence proves.¹⁰

§ 446. Misconduct of Jury Generally—Prejudicial Character.—To warrant the granting of a new trial upon the ground of the misconduct of the jury, it must either be shown as a fact, or presumed as a conclusion of law, that injury resulted from the misconduct.¹¹ When it is clear that the defendant was not injured by the misconduct, a verdict against him will not be disturbed.¹²

Conversations with jurors.—When it is shown either that a juror has engaged in conversation with others on the subject of the charge upon which he is to pass, or has voluntarily listened to third persons upon matters concerning the trial, then such misconduct is *prima facie* established as to authorize the court in setting aside the verdict. The evil to be guarded against is improper influence, and when an exposure to such influence is shown and it is not shown that it failed of effect, then the presumption is against the verdict.¹³ But it is not legal

10. *People v. Muhlner*, 115 Cal. 303, 47 Pac. 128.

11. *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. Dennis*, 39 Cal. 625; *People v. Lyle*, 2 Cal. Unrep. 393, 4 Pac. 979; *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508; *People v. Yee King*, 24 Cal. App. 509, 141 Pac. 1047. See *supra*, § 443, for Pen. Code, § 1181, subd. 3.

12. *People v. Lyle*, 2 Cal. Unrep. 393, 4 Pac. 979; *People v. Quimby*, 6 Cal. App. 482, 92 Pac. 493 (where the juror received no information from the officer in response to his

question). See *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207, where remark made by a juror was held not improper. See *infra*, § 447, as to reading newspaper reports and as to unauthorized view of premises and experiments.

13. *People v. Turner*, 39 Cal. 370 (holding that the conduct of a juror in attending and remaining at a public meeting where the case was discussed is ground for a new trial, whether the juror knew the character of the meeting before he went there or not).

misconduct requiring the granting of a new trial for a juror to engage in conversation with third persons on subjects disconnected with the case on trial.¹⁴ The fact that a juror talked to the prosecuting witness or to a relative of the victim of the crime is not of itself sufficient to raise a presumption that he was improperly influenced,¹⁵ but it calls for an explanation. This is a matter resting in the discretion of the trial court, and if it does not appear that the conversation related to the case on trial it is not an abuse of discretion to refuse a new trial.¹⁶ So also the fact that the jurors conversed among themselves does not require the granting of a new trial where it is not shown that the conversation had improper reference to the evidence or merits of the case. And even in that case, it must also be shown that it was of a character calculated to prejudice the defendant.¹⁷

Misconduct before juror is sworn.—It is clear that the “misconduct” of a juror which is ground for a new trial is misconduct while he is such juror, and has no reference to what he does before he is sworn to try the case.¹⁸

§ 447. Readings Newspapers—Unauthorized View and Experiments.—The reading of newspaper accounts of the trial is ground for new trial when prejudicial to the accused.¹⁹ But the reading of a fair report of the pro-

14. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Sprague*, 53 Cal. 491 (unimportant communication with officer in charge of jury); *People v. Kelly*, 46 Cal. 355; *People v. Brannigan*, 21 Cal. 337; *People v. Boggs*, 20 Cal. 432; *People v. Pyle*, 44 Cal. App. 130, 185 Pac. 1019; *People v. Harrison*, 14 Cal. App. 545, 112 Pac. 733.

15. *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130.

16. *People v. Phelan*, 123 Cal. 551, 567, 56 Pac. 424.

17. *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. West*, 73 Cal. 345, 14 Pac. 848.

18. *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

19. *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. Murray*, 85 Cal. 350, 24 Pac. 666 (holding it error to exclude evidence of improper use of newspapers to influence or intimidate jurors in a case by abusing other jurors who

ceedings cannot possibly prejudice the defendant, and will not authorize a new trial.²⁰ And it is doubtful if the mere reading of an article containing no reference to any particular case, but which is merely a general article relative to the failure of justice in case of certain classes of crimes, can be held to have influenced the jury.¹ If, however, the newspaper contains any matter in connection with the subject matter of the trial which would be at all likely to influence the jury in the performance of their duty, a presumption of improper influence arises, and a new trial will be granted,² without requiring the defendant to show that harm has in fact been done his cause.³

Unauthorized view and experiments.—Misconduct of jurors in conducting experiments outside the courtroom is ground for new trial.⁴ While an unauthorized clandestine visit of a juror to the scene of the crime is an irregularity constituting serious misconduct, it has been held that it does not warrant the granting of a new trial unless prejudice is shown to have followed. If it is not shown that the juror had seen or heard anything different from or contradictory to the evidence received upon the trial, or resulted in an understanding of the evidence in anywise different from that conveyed to them by the testimony on the trial, the verdict must stand.⁵

had returned verdicts of acquittal in the same court); *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

20. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Leary*, 105 Cal. 486, 39 Pac. 24.

1. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

2. *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207 (where the article included a matter of evidence that was excluded by the court, and contained intimations that some of the jurors

had been corrupted); *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

3. *People v. Leary*, 105 Cal. 486, 39 Pac. 24.

4. *People v. Conkling*, 111 Cal. 616, 44 Pac. 314.

5. *People v. Rowell*, 133 Cal. 39, 65 Pac. 127 (holding that the mere circumstance of a juror visiting a public place of business in which the defendant claimed he was present when the crime was committed cannot affect the defendant prejudicially); *People v. Tugwell*, 32

§ 448. **Use of Intoxicating Liquors—Furnishing Refreshments to Jurors.**—As a general rule, the mere fact that a juror drank intoxicating liquor during a trial does not afford ground for a new trial, where there is no pretense that he was intoxicated or affected by the liquor.⁶ The burden of showing prejudice resulting therefrom rests upon the defendant.⁷ If the juror was affected during a recess of the court but did not seem to have been under its influence while sitting as a juror, a new trial may be denied.⁸ So also the drinking of liquor while deliberating upon a verdict will not require the granting of a new trial, unless it rendered a juror unfit for the proper discharge of his duty.⁹ But it has been held that where the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict in a capital case, a verdict of conviction should not be allowed to stand.¹⁰ If it is necessary that intoxicating liquors of any kind should be drunk by a juror, application for leave to do so should be made to the court, who can make such allowance as will be proper.¹¹

Necessity for objection.—It seems that the rule in criminal, as in civil, actions is that if a juror is palpably intoxicated in court and the party or his counsel perceive

Cal. App. 520, 163 Pac. 508 (holding that an unauthorized view by a juror did not require a new trial where the conditions at the scene of the crime were so changed that no information could then be obtained which would corroborate the testimony of the prosecution); *People v. Yee King*, 24 Cal. App. 509, 141 Pac. 1047.

6. *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *People v. Leary*, 105 Cal. 486, 39 Pac. 24 (holding that the mere fact that liquor was taken clandestinely to the jury-room does not vitiate the verdict); *People v. Bemmerly*, 98 Cal. 299,

33 Pac. 263; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

7. *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263.

8. *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Boyd*, 16 Cal. App. 130, 116 Pac. 323; *People v. Romero*, 12 Cal. App. 466, 107 Pac. 709; *People v. Howard*, 74 Cal. 547, 16 Pac. 394.

9. *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549.

10. *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719.

11. *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549.

it, objection should be made before the retirement of the jury or it will be deemed waived.¹²

Where refreshments are furnished by attorneys or officers.—It is improper or indiscreet for the prosecuting attorney to furnish refreshments to the jurors, as his acts may be injuriously interpreted by those adversely interested in the trial. Yet, such acts in themselves, unaccompanied by words or circumstances tending to show improper motives or the creation of a bias in the minds of any of the jurors, do not justify an inference that the jury were influenced by them in making up their verdict.¹³ So also the mere fact that the officer in charge of the jury invited them to take a drink of intoxicating liquor is not ground for a new trial.¹⁴

§ 449. Separation of Jury Before Submission of Cause. The mere fact of separation of the jury in violation of an order of court that they be kept together during trial does not give the defendant the right to have the verdict set aside.¹⁵ The rule seems to be that the burden of showing that prejudice resulted from a separation before the submission of the case to the jury rests upon the defendant moving for a new trial,¹⁶ and that he must show as fully, as if the direction had not been given, that one or more of the jurors were influenced in their verdict by some outside influence during or in consequence of such separation.¹⁷

12. *People v. Deegan*, 88 Cal. 602, 26 Pac. 500 (De Haven, J., dissenting); *People v. Williams*, 24 Cal. App. 646, 142 Pac. 124. But see *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549, per Thornton, J., stating that the verdict should not stand, if a juror becomes intoxicated with the consent of the defendant.

13. *People v. Lyle*, 2 Cal. Unrep. 393, 4 Pac. 977.

14. *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538.

15. *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. Symonds*, 22 Cal. 348; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

16. *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. Symonds*, 22 Cal. 348. See *People v. Emmons*, 7 Cal. App. 685, 696, 95 Pac. 1032, where the question is raised but not decided.

17. *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263.

In general, brief separations of jurors for a necessary purpose are not ordinarily ground for a new trial in the absence of a showing of prejudice to defendant's rights resulting therefrom.¹⁸

§ 450. Separation After Submission of Cause.—A distinction exists between a separation of the jury before the submission of a case and a separation afterwards. As has been shown, after the jury have finally retired they must be kept together during their deliberations,¹⁹ and during that time they are not to be separated except by leave of the court. For an infraction of these rules a new trial may be granted.²⁰ However, a separation of a jury after the submission of the cause to them is not ground for a new trial if no prejudice resulted therefrom. But unlike the rule governing separations before the submission of the cause, the burden of showing prejudice does not rest upon the defendant.¹ The rule is that where a jury has been permitted to separate while deliberating upon a verdict, under such circumstances as to make it appear that they might have been tampered with, a new trial will be granted unless there is affirmative proof on behalf of the people explaining the separation and showing that the defendant was not prejudiced thereby.² If this burden is

The Idaho statute permits the jury to separate at any time prior to the final submission of the cause in all felony cases except murder. In the latter case, when a defendant shows that the jury have separated in violation of the statute, he is prima facie entitled to a new trial unless the state shows clearly and beyond a reasonable doubt that no prejudice resulted. *State v. Sly*, 11 Idaho, 110, 80 Pac. 1125, overruling *State v. Levy*, 9 Idaho, 483, 75 Pac. 227, which followed the rule of *People v. Bemmerly*, supra.

18. *People v. Moore*, 41 Cal. 238.

See *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; and *People v. Lee*, 17 Cal. 76, for other instances of brief separations held not prejudicial.

19. See supra, § 415.

20. Pen. Code, § 1181, subd. 3.

1. *People v. Brannigan*, 21 Cal. 337.

2. *People v. Cord*, 157 Cal. 562, 108 Pac. 511; *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92, 66 L. R. A. 247, 76 Pac. 954; *People v. Hawley*, 111 Cal. 78, 43 Pac. 404; *People v. Brannigan*, 21 Cal. 337; *People v. Backus*, 5 Cal. 275; *Peo-*

assumed by the people a new trial should be denied,³ but otherwise it will be granted.⁴ This rule applies also where an officer enters the jury-room to meet an emergency and takes with him a person suitable to assist him.⁵ If a juror is absent from the jury-room for some minutes, and it is shown nothing was said about the case during his absence, the separation is not prejudicial.⁶ But to divide the jury into different groups and put them in different widely separated rooms in a hotel, is such a separation as requires a new trial, unless the separation is such as is authorized by the code where the jury is composed of both men and women. If the law would countenance an attempt to show absence of prejudice in such a case as this, nothing less than the affidavits of the jurors would suffice.⁷

§ 451. Reception of Evidence Out of Court.—Evidence, within the rule which provides for the granting of a new trial when the jury has received any evidence out of court other than that resulting from a view of the premises,⁸ is that which tends to prove or disprove any matter in question or influence the belief respecting it. For example, an unauthorized inspection of a diagram is receiving evidence out of court, if from the inspection the juror received evidence of something not already testified to or

ple v. Carson, 32 Cal. App. Dec. 1051, 192 Pac. 318.

3. People v. Cord, 157 Cal. 562, 108 Pac. 511; People v. Wheatley, 88 Cal. 114, 26 Pac. 95; People v. Carson, 32 Cal. App. Dec. 1051, 192 Pac. 318.

4. People v. Adams, 143 Cal. 208, 101 Am. St. Rep. 92, 66 L. R. A. 247, 76 Pac. 954; People v. Thornton, 74 Cal. 482, 16 Pac. 244 (granting a new trial where three jurors went to a bar, not more than twenty-five feet distant from the

other jurors, and ordered some drinks which were given them).

5. People v. Weston, 32 Cal. App. 571, 163 Pac. 691.

6. People v. Wheatley, 88 Cal. 114, 26 Pac. 95; People v. Bonney, 19 Cal. 426, 445.

7. People v. Adams, 143 Cal. 208, 101 Am. St. Rep. 92, 66 L. R. A. 247, 76 Pac. 954. See supra, § 415, as to separation of jury after submission of cause.

8. See supra, § 443, for wording of Pen. Code, § 1181, subd. 2.

if he acquired some additional evidence.⁹ So also it is receiving evidence out of court if the jury read portions of a document not read in their presence, and if the document is not taken to the jury-room as provided in section 1137 of the Penal Code.¹⁰ But an unauthorized or merely casual examination which does not tend to prove or disprove any matter in question or influence the belief of the jury concerning it does not amount to receiving "evidence out of court."¹¹ Where it is proved as a fact, or presumed as a conclusion of law, that a verdict has been influenced by information or impressions received by the jury from sources outside of the evidence, such verdict is subject to be set aside on a motion for new trial.¹²

§ 452. Newly Discovered Evidence as Ground for New Trial Generally.—The provision in the code that the court may grant a new trial when new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial,¹³ first appeared in the Criminal Practice Act as amended in 1863.¹⁴ Prior thereto, a new trial on this ground was not provided for.¹⁵ The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial

9. *People v. Anthony*, 146 Cal. 124, 79 Pac. 858.

10. *People v. Thornton*, 74 Cal. 482, 16 Pac. 244.

11. *People v. Tipton*, 73 Cal. 405, 14 Pac. 894 (examination out of court of horns of stolen animal); *People v. Wademan*, 38 Cal. App. 116, 135, 175 Pac. 791 (casual looking at baby of the prosecutrix in a rape case while out of court). See *infra*, § 447, as to unauthorized view and experiments by jurors.

12. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Murray*, 85 Cal. 350, 24 Pac. 666; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

13. See *supra*, § 443, for wording of Pen. Code, § 1181, subd. 7; *People v. Stanford*, 64 Cal. 27, 28 Pac. 106; *People v. Carty*, 2 Cal. Unrep. 294, 3 Pac. 609.

14. *Stats.* 1863, p. 161, § 17.

15. *People v. Bernstein*, 18 Cal. 699.

all existing evidence in his behalf.¹⁶ It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence.¹⁷ It is recognized, however, that despite the exercise of such effort, cases will sometime occur where, after trial, new evidence most material to the issue and which would probably have produced a different result is discovered. For such cases, the remedy of motion for a new trial on this ground has been given.¹⁸

§ 453. Diligence to Discover Evidence.—To entitle a party to a new trial upon the ground that new evidence has been discovered, it is necessary that the evidence, and not merely the fact of its materiality, be newly discovered.¹⁹ The party who relies upon newly discovered evidence as a ground for a new trial must have made reasonable effort to produce all his evidence at the trial.²⁰ He will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of the trial,¹ or which would have been known to

16. *People v. Byrne*, 160 Cal. 217, 225, 116 Pac. 521, 525; *People v. Gonzales*, 143 Cal. 605, 77 Pac. 448; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Mar Gin Suie*, 11 Cal. App. 42, 56, 103 Pac. 951.

17. *People v. Freeman*, 92 Cal. 359, 366, 28 Pac. 261 (quoted with approval in *People v. Byrne*, 160 Cal. 217, 116 Pac. 521). See *infra*, § 459.

18. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521. See *infra*, § 453, as to diligence.

19. *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

20. *People v. Byrne*, 160 Cal. 217,

116 Pac. 521; *People v. Taminago*, 35 Cal. App. 238, 169 Pac. 696; *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768.

1. *People v. Harris*, 169 Cal. 53, 145 Pac. 520; *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Soap*, 127 Cal. 408, 59 Pac. 771; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424 (holding that evidence was so related to the testimony of the witness that it should have been brought out upon cross-examination); *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Cummings*, 57 Cal. 88; *People v. Ah Ton*, 53 Cal. 741; *People v. Miller*, 33 Cal. 99; *People v. Jones*, 2 Cal. Unrep. 563, 8 Pac. 611; *People v. Lyle*, 2 Cal. Unrep. 393, 4 Pac.

him had he exercised reasonable diligence in preparing for and presenting his defense.² In accord with these principles, the testimony of a witness absent from the trial because his whereabouts were then unknown, the existence and materiality of which were known to the defendant before the trial, is not newly discovered evidence within the statute, although the defendant had endeavored to find the witness before the trial. So also, evidence discovered before the trial but too late to be procured is not newly discovered evidence. Knowing of the importance of the testimony the defendant ordinarily should move for a continuance. Failing to do so, he must be held to have entered upon the trial at his peril.³ In a case where the counsel for defendant believed that the defendant was not normally minded, yet made no effort at the trial to present evidence of his insanity, affidavits of physicians as to defendant's insanity were held not newly discovered evidence within the rule.⁴ The fact the defendant's attorney learned that a witness had been subpoenaed by the prosecution furnishes no excuse for the defendant's failure to use the witness if he desired the testimony.⁵ When a witness is incompetent or his testimony is privileged, a restoration to competency or a waiver of the privilege

977; *People v. Evans*, 34 Cal. App. 284, 167 Pac. 190 (application denied where counsel knew of the testimony but thought it was evidence as to character rather than as to alibi); *People v. Tugwell*, 28 Cal. App. 348, 152 Pac. 740; *People v. Kwpr Singh*, 11 Cal. App. 427, 105 Pac. 423; *People v. Fitzgerald*, 1 Cal. App. 507, 82 Pac. 555.

2. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Luchetti*, 119 Cal. 501, 51 Pac. 707; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v.*

Howard, 74 Cal. 547, 16 Pac. 394; *People v. Leong Yune Gun*, 77 Cal. 636, 20 Pac. 27; *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24; *People v. Bones*, 35 Cal. App. 429, 170 Pac. 166; *People v. Davis*, 26 Cal. App. 647, 147 Pac. 1184.

3. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521.

4. *People v. Taminago*, 35 Cal. App. 238, 169 Pac. 696.

5. *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318.

after verdict does not conclusively entitle a defendant to a new trial. In general, the matter of granting a new trial on this ground rests largely in the discretion of the trial court.⁶ Each case must be determined by its circumstances, and a new trial granted or refused according to the view of the whole evidence in connection with the alleged newly discovered evidence.⁷

§ 454. Character of Evidence.—To warrant the granting of a new trial on the ground of newly discovered evidence, the newly discovered evidence must be admissible⁸ and material,⁹ and it must be such as to render a different verdict reasonably probable upon a retrial.¹⁰ If the newly discovered evidence is merely cumulative and is not such as to render a different result probable upon a retrial, a new trial will not be granted, even though a continuance might have been granted, if applied for, to

6. *People v. Bryne*, 160 Cal. 217, 116 Pac. 521; *People v. Merkle*, 89 Cal. 82, 26 Pac. 642; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

7. *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834. See *infra*, § 463, as to discretion of the trial court.

8. *People v. Voll*, 43 Cal. 166; *People v. Lopez*, 34 Cal. App. Dec. 562, 197 Pac. 144.

9. Pen. Code, § 1181, subd. 7; *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *People v. Soap*, 127 Cal. 408, 59 Pac. 771; *People v. Epinger*, 114 Cal. 350, 46 Pac. 97; *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790; *People v. Chin Ah Hong*, 61 Cal. 376; *People v. Kelleher*, 2 Cal. Unrep. 821, 16 Pac. 705 (holding that evidence of another's guilt of the crime charged required the granting of a new trial); *People v.*

Kruvosky, 35 Cal. App. Dec. 824, 200 Pac. 831.

10. *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165; *People v. Bennett*, 161 Cal. 214, 118 Pac. 710; *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Gonzales*, 143 Cal. 605, 77 Pac. 448; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Leong Yune Gin*, 77 Cal. 636, 20 Pac. 27; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Woodruff*, 6 Cal. Unrep. 346, 58 Pac. 854; *People v. Purio*, 33 Cal. App. Dec. 413, 194 Pac. 74; *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055.

continue a search for it.¹¹ It is not the law, however, that newly discovered evidence is not ground for a new trial merely because it comes within the category of "cumulative." If it is such that a different result upon a retrial is reasonably probable, and the application is sufficient in other respects, a new trial will be granted.¹² To put an extreme case, a mass of highly important newly discovered evidence should not be disregarded because there had been some slight, insignificant, and inconclusive evidence introduced at the trial on the same subject.¹³ Again, newly discovered evidence which is designed merely to impeach or contradict a witness for the prosecution will not ordinarily furnish ground for a new trial.¹⁴

11. *People v. Lapique*, 136 Cal. 503, 69 Pac. 226; *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *People v. Clarke*, 130 Cal. 642, 63 Pac. 138; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *People v. Kloss*, 115 Cal. 567, 47 Pac. 459; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Mesa*, 93 Cal. 580, 29 Pac. 110; *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096; *People v. Cesena*, 90 Cal. 381, 27 Pac. 300; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Chin Ah Hong*, 61 Cal. 376; *People v. Anthony*, 56 Cal. 397; *People v. McDonell*, 47 Cal. 134; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396; *People v. Gorman*, 31 Cal. App. 762, 161 Pac. 757; *People v. Davis*, 26 Cal. App. 647, 147 Pac. 1184; *People v. Von Perhacs*, 20 Cal. App. 48, 127 Pac. 1048; *People*

v. Maruyama, 19 Cal. App. 290, 125 Pac. 924; *People v. Kwpr Singh*, 11 Cal. App. 427, 105 Pac. 423; *People v. Yee Foo*, 4 Cal. App. 730, 89 Pac. 450; *People v. Cowan*, 1 Cal. App. 411, 82 Pac. 339; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

12. *People v. Demasters*, 109 Cal. 607, 42 Pac. 236.

13. *People v. Lapique*, 136 Cal. 503, 69 Pac. 226.

14. *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917; *People v. Ah Moon*, 116 Cal. 656, 48 Pac. 799; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Cesena*, 90 Cal. 381, 27 Pac. 300; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Anthony*, 56 Cal. 397; *People v. McCauley*, 45 Cal. 146; *People v. Lyle*, 2 Cal. Unrep. 393, 4 Pac. 977; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396; *People v. Yip Sing*, 33 Cal. App. 236, 164 Pac. 806; *People v. Ong Git*, 23 Cal.

Yet under certain circumstances newly discovered evidence though incidentally contradictory to the testimony of the prosecuting witness may require the granting of a new trial.¹⁵

§ 455. Right to Move for New Trial Generally—How Exercised.—A new trial can be granted only on the application of a defendant¹⁶ made before judgment.¹⁷ If a new trial is granted either by the trial court or by an appellate court, the case stands as though no trial has ever been had, and upon the conclusion of the second trial a motion for a new trial is as regularly in order as at the conclusion of the first trial.¹⁸ But when the motion is made and denied, the right to move for a new trial is exhausted.¹⁹

Since the statute neither requires nor authorizes a motion for a new trial in a criminal case to be made in writing, it must be made *viva voce*.²⁰ While in practice the grounds of the motion and the application are often reduced to writing and filed, this is not sufficient. The

App. 148, 137 Pac. 283; *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477; *People v. Davis*, 26 Cal. App. 647, 147 Pac. 1184; *People v. Von Perhaes*, 20 Cal. App. 48, 127 Pac. 1048.

15. *People v. Kaufman*, 33 Cal. App. Dec. 338, 193 Pac. 953.

16. *People v. Bangeneaur*, 40 Cal. 613.

17. Pen. Code, § 1182; *People v. Walker*, 142 Cal. 90, 75 Pac. 658; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387.

An application for leave to amend a motion for a new trial made after a denial of the motion and after judgment comes too late; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216;

People v. Long, 7 Cal. App. 27, 93 Pac. 387.

18. *People v. Walker*, 142 Cal. 90, 75 Pac. 658.

19. *People v. Walker*, 142 Cal. 90, 75 Pac. 658; *People v. Sing Lum*, 61 Cal. 538 (holding that the court may refuse to entertain a second motion for a new trial when an order for the execution of the defendant on a judgment of death has been made as provided in section 1227 of the Penal Code); *People v. Ingersoll*, 21 Cal. App. 763, 132 Pac. 1052.

20. *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Ah Sam*, 41 Cal. 645.

attention of the court must be called to it and the court moved to grant it.¹

Before what court.—More properly the judge who heard a case on the trial should hear the motion for a new trial. But this is not a statutory right or obligation, and the mere fact that the motion was passed upon by another judge is not ground for reversal, especially where no objection was made by the defendant until afterwards.²

§ 456. Evidence in Support of Motion.—In the California practice, a motion for new trial in a criminal case is made without any bill of exceptions, or statement or specifications of error and without any reporter's notes being filed in support of the motion.³ When the ground of the motion is that the verdict is contrary to the evidence, the motion is heard as if brought on for hearing immediately after the rendition of the verdict. The defendant is not required, as in civil cases, to specify the respects in which the evidence is insufficient. Consequently, on the hearing of the motion, in a criminal case, he may rely on the point that the evidence is insufficient to support any one of the facts in issue.⁴

When the grounds for a new trial are not apparent of record, it is the usual and ordinary course upon the hearing to present affidavits in support of the motion. While it seems that section 2002 of the Code of Civil Procedure authorizing the testimony by affidavit, deposition or oral examination is applicable,⁵ it is within the discretion of the court to require all evidence to be put in the form of

1. *People v. Ah Sam*, 41 Cal. 645; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387.

2. *People v. Hobson*, 17 Cal. 424.

3. *Walker v. Superior Court*, 135 Cal. 369, 67 Pac. 336; *Sansome v. Myers*, 80 Cal. 483, 22 Pac. 212

(per Beatty, C. J., concurring); *People v. Hewill*, 56 Cal. 117; *People v. Keyser*, 53 Cal. 183; *People v. Fisher*, 51 Cal. 319; *People v. Ah Fat*, 47 Cal. 631.

4. *People v. Fisher*, 51 Cal. 319.

5. *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101.

affidavits or depositions.⁶ When the conduct of jurors exposes them to suspicion, an application for process in order that the jurors may be examined as to their misconduct is addressed to the discretion of the trial court.⁷ It is within the discretion of the trial court to refuse to allow a cross-examination of witnesses who make counter-affidavits.⁸ And the trial judge may refuse to be sworn to testify to immaterial facts.⁹ As a jury has nothing to do with the punishment, the court may refuse to hear proof that the verdict would have been different if the jury had correctly understood the rules as to the imposition of punishment.¹⁰

On a motion for new trial because of a denial of a continuance to procure the presence of absent witnesses, the affidavits of the absent witnesses that they would testify to the facts stated, should be obtained or good reason for not obtaining them given.¹¹

§ 457. Proof of Misconduct of Jury.—It is presumed that the jury performed their duty with fidelity to their oath and that they observed the admonitions of the judge in reference to their misconduct.¹² When misconduct of a juror is the basis of a motion for a new trial, there must be some positive testimony of such misconduct by some person, who has knowledge of the facts. An affidavit upon information and belief is simply a charge without proof to sustain it, and is insufficient to require a denial or evidence in reply.¹³ Public policy forbids a juror from

6. *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101; *People v. Tucker*, 117 Cal. 229, 49 Pac. 134.

7. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

8. *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101.

9. *People v. Azoff*, 105 Cal. 632, 39 Pac. 59.

10. *People v. Lee*, 17 Cal. 76.

11. *People v. Jocelyn*, 29 Cal. 562

(cited in *People v. Breen*, 130 Cal. 72, 62 Pac. 408); *People v. De Lacey*, 28 Cal. 589.

12. *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. Williams*, 24 Cal. 31.

13. *People v. Hower*, 151 Cal. 638, 91 Pac. 507; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *People v. Williams*, 24 Cal.

impeaching his verdict,¹⁴ and the same policy prevents such impeachment by statements made by the juror to others.¹⁵

Since the misconduct of a juror will not warrant a new trial unless it is of a character calculated to prejudice the defendant,¹⁶ it is necessary that he show the existence of facts which may have influenced the verdict. But when he does so, a presumption of prejudice arises and it is not necessary for the defendant to show that harm has in fact been done his cause. It is for the successful party to show that as a matter of fact the verdict was not influenced by such facts.¹⁷ Upon the showing of misconduct by a juror the law presumes prejudice, and this presumption cannot be overcome by a counter conclusion based upon mere conjecture that the court knew the mental and moral characteristics of the jurors.¹⁸

Reading newspaper accounts.—When it is claimed that a juror read newspaper accounts of the trial, it must be shown that such accounts have come to the knowledge of the juror.¹⁹ It is not sufficient merely to show a publication of the articles,²⁰ or an opportunity to read them, as, for example, that they were left in the courtroom while the jury were deliberating therein. There must be positive testimony by someone, other than a juror, who has

31; *People v. Fong Sing*, 38 Cal. App. 253, 175 Pac. 911.

14. See *infra*, § 458.

15. *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599; *People v. Murphy*, 146 Cal. 502, 80 Pac. 709; *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *People v. Findley*, 132 Cal. 301, 64 Pac. 472; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Clark*, 183 Cal. 677, 192 Pac. 521; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

16. See *supra*, § 443.

17. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

18. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829.

19. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272.

20. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

knowledge of the facts showing that the jurors read the articles, or at least that they found them or that they in some way came to their notice.¹ An affidavit stating that a newspaper article was read to a juror need not show what degree of attention was paid to the reading, for it will be assumed that he heard it.² It is necessary also to prove the substance of what was read, or to show that the paper contained something which could prejudice the reader against the defendant or his cause.³

§ 458. Affidavits of Jurors.—It is the settled law of California that a verdict cannot be impeached by the affidavits or testimony of jurors showing misconduct on the part of any member of the jury;⁴ except where the verdict is reached “by a resort to the determination of chance.”⁵ The application of this rule is no less necessary in criminal than in civil cases.⁶ Although in other jurisdictions there is authority to the contrary, in California no distinction is made in this respect between misconduct occurring in the jury-room and elsewhere.⁷ In accordance with this rule, a juror cannot be allowed to impeach a verdict to which he has assented, by swearing he did not understand it, or that he was too timid and confused to express

1. *People v. Williams*, 24 Cal. 31.
2. *People v. Wong Loun*, 159 Cal. 520, 114 Pac. 829.

3. *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899.

4. *People v. Wong Loun*, 159 Cal. 520, 114 Pac. 829; *People v. Murphy*, 146 Cal. 502, 80 Pac. 709; *People v. Findley*, 132 Cal. 301, 64 Pac. 472; *People v. Soap*, 127 Cal. 408, 59 Pac. 771; *People v. Kloss*, 115 Cal. 567, 47 Pac. 459; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Pratt*, 78 Cal. 345, 20 Pac. 731; *People v. Dye*, 62 Cal. 523; *People v. Gray*, 61

Cal. 164, 44 Am. Rep. 549; *People v. Sprague*, 53 Cal. 491; *People v. Doyell*, 48 Cal. 85; *People v. Hughes*, 29 Cal. 257; *People v. Wyman*, 15 Cal. 70; *People v. Baker*, 1 Cal. 403; *People v. Sellers*, 1 Cal. Unrep. 34; *People v. Sidwell*, 29 Cal. App. 12, 154 Pac. 290; *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

5. Code Civ. Proc., § 657.

6. *People v. Baker*, 1 Cal. 403 (stating the general rule prior to the code).

7. *People v. Wong Loun*, 159 Cal. 520, 114 Pac. 829.

his dissent at the time he ought to have dissented. A trial court may refuse to allow an affidavit of a juror impeaching his verdict to be filed,⁸ or it may refuse to consider such affidavit if filed.⁹

To purge misconduct.—The rule above stated does not preclude a consideration of affidavits of jurors when offered by the people as the prevailing party, for the purpose of sustaining the verdict.¹⁰ When evidence has been introduced tending to show misconduct on the part of the jury, the affidavits of the jurors are admissible to disprove the misconduct, or the existence of any disturbing influence,¹¹ but not to show whether the misconduct did or did not influence their deliberations and decisions.¹² In an early case it was held that after a separation of the jury, the affidavits of the jurors cannot be received to purge their conduct from the imputation of corruption or impropriety.¹³ But this holding has been weakened by later authorities, and now such affidavits may be received.¹⁴

If the affidavit of the defendant is insufficient because made upon information and belief, the affidavit of the juror expressly admitting the misconduct and attempting

8. *People v. Kloss*, 115 Cal. 567, 47 Pac. 459.

9. *People v. Holmes*, 118 Cal. 444, 50 Pac. 675.

10. *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Yee King*, 24 Cal. App. 509, 141 Pac. 1047.

11. *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. Murray*, 94 Cal. 212, 28 Am. St. Rep. 113, 29 Pac. 494; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Hunt*, 59 Cal. 430.

12. *People v. Chin Mon*, 146 Cal.

561, 80 Pac. 681; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207 (disapproving contrary intimations in *People v. Murray*, 85 Cal. 350, 24 Pac. 666, and same case on later appeal, 94 Cal. 212, 28 Am. St. Rep. 113, 29 Pac. 494, and *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

13. *People v. Backus*, 5 Cal. 275.

14. *People v. Adams*, 143 Cal. 208, 101 Am. St. Rep. 92, 66 L. R. A. 247, 76 Pac. 954; *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169 (referring to *People v. Backus*, 5 Cal. 275).

to excuse it may be sufficient to show the misconduct. To such a case the rule against allowing jurors to impeach their own verdict ought not to be applied.¹⁵ This latter rule should not, however, be extended to allow such impeachment to be accomplished, where there is no express admission of misconduct, but merely a failure to deny certain allegations made upon information and belief.¹⁶

§ 459. Affidavits on Motion Based on Newly Discovered Evidence.—When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given.¹⁷ This is necessary to show the materiality of the evidence to the defendant's case.¹⁸ There must also be a showing of the reasons why the evidence was not produced at the trial,¹⁹ or the reason for the failure to discover the witness before trial,²⁰ or, in other words, a showing of diligence.¹ Because of the distrust with which motions upon this ground are regarded, the courts require the very strictest showing of diligence to discover the evidence before the trial;² and when newly discovered evidence is to be presented by former witnesses, a strong or exceptional showing must be made to overcome the appar-

15. *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681.

16. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100.

17. Pen. Code, § 1181, subd. 7 (in part).

18. *People v. Eppinger*, 114 Cal. 350, 46 Pac. 97; *People v. Evans*, 34 Cal. App. 284, 167 Pac. 190. See supra, § 454.

19. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

20. *People v. Larrabee*, 115 Cal. 158, 46 Pac. 922.

1. *People v. Goodrich*, 41 Cal.

App. 38, 181 Pac. 805. See supra, § 453.

2. *People v. Gonzales*, 143 Cal. 605, 77 Pac. 448; *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Larrabee*, 115 Cal. 158, 46 Pac. 922; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477; *People v. Brown*, 28 Cal. App. 261, 152 Pac. 58; *People v. Von Perhacs*, 20 Cal. App. 48, 127 Pac. 1048.

ent lack of diligence in securing the evidence.³ It should be shown that the facts could not with due diligence have been presented at the trial, or that they were not within the knowledge of the defendant and the witnesses at that time.⁴ An affidavit of a former witness that he committed perjury on the trial may furnish grounds for a new trial, but it does not entitle the defendant to a new trial as a matter of right, for the conclusion of the jury may rather warrant the presumption that his testimony was truthful and his affidavit false. However, perjury may have been committed. Whether it has or not is a matter left largely with the trial judge to determine.⁵

§ 460. **Counter-affidavits.**—Although at one time there was some doubt as to the right of the prosecution, on a motion for new trial on the ground of newly discovered evidence, to file counter-affidavits in rebuttal of the showing made by the defendant, the rule is now settled that it may do so. It may file affidavits discrediting the newly discovered witnesses, or disputing the alleged facts to be testified to by them,⁶ and it may show that due diligence has not been used.⁷ Such counter-affidavits are received and considered simply for the purpose of enabling the trial court to exercise its discretionary powers intelligently and they are not objectionable as depriving a party of his right to have the facts passed upon by a jury.⁸

3. *People v. Griner*, 124 Cal. 19, 56 Pac. 625.

4. *People v. Brown*, 28 Cal. App. 261, 152 Pac. 58.

5. *People v. Tallmadge*, 114 Cal. 432, 46 Pac. 1114.

6. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235 (overruling *Shafer v. Willis*, 124 Cal. 36, 56 Pac. 635). See *People v. Clarke*, 130 Cal. 642, 63 Pac. 138 (query). And see, also, the following cases,

where counter-affidavits were filed and considered, without questioning their propriety: *People v. Fice*, 97 Cal. 459, 32 Pac. 531; *People v. Mesa*, 93 Cal. 580, 29 Pac. 116; *People v. Kawasaki*, 23 Cal. App. 92, 137 Pac. 287; *People v. Kwpr Singh*, 11 Cal. App. 427, 105 Pac. 423.

7. *People v. Cesena*, 90 Cal. 381, 27 Pac. 300.

8. *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235.

So also when misconduct of the jury is claimed, the people may file counter-affidavits of the jurors in support of the verdict.⁹

§ 461. Time of Hearing and Continuances.—It is provided in the code that if time is required by the defendant to procure affidavits of the witnesses by whom the newly discovered evidence is expected to be given, the court may postpone the hearing of the motion for such length of time as under all circumstances of the case may seem reasonable.¹⁰ The matter of allowing a continuance under this provision rests in the discretion of the court.¹¹ In determining whether a continuance shall be granted, the court is called upon to determine whether the defendant is entitled to it, and if so for what period of time and whether such continuance will promote justice.¹² Therefore, the defendant should offer some evidence in support of his application.¹³ He should make a showing of what is expected to be set forth in the affidavits of the witnesses,¹⁴ and of a reason why the affidavits have not already been secured.¹⁵ He should also give the court reasonable grounds for his belief that the affidavits can be obtained.¹⁶

§ 462. Hearing and Determination.—Section 4½ of article VI of the constitution forbids the setting aside

9. See *supra*, § 458.

10. Pen. Code, § 1181, subd. 7 (in part).

11. *People v. Brennan*, 35 Cal. App. 101, 169 Pac. 239.

12. *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382.

13. *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382.

14. *People v. Ross*, 134 Cal. 256, 66 Pac. 229; *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382.

15. *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382.

16. *People v. Ross*, 134 Cal. 256, 66 Pac. 229.

The court may in its discretion deny a second continuance of the hearing, when the former took the matter up to within one day of the time which the court could have granted the defendant under section 1191 of the Penal Code without nullifying the verdict. *People v. Wing*, 23 Cal. App. 50, 137 Pac. 47. See *infra*, § 468.

of a judgment or granting of a new trial on account of errors as to any matter of pleading or procedure unless after an examination of the entire cause, including the evidence, the court is of the opinion the error resulted in a miscarriage of justice. This section, while applicable to appellate courts,¹⁷ is not in terms limited to them but applies to trial courts as well, and must be borne in mind when passing upon motions for new trial predicated upon errors in the proceedings.¹⁸ But a motion to set aside an order denying a new trial, which is in effect a second motion for a new trial, is unauthorized. Obviously, such right cannot be revived and retried under the guise of a motion to vacate.¹⁹

The trial court has a wide discretion as to the propriety of setting aside an order denying a motion for new trial to enable the defendant to produce additional affidavits.²⁰ And the court may impose reasonable limitations upon the time for argument upon such motion.¹

It is provided that the order granting or denying a new trial must be immediately entered by the clerk in the minutes.²

Effect of granting new trial.—"The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might be had under the indictment."³ The introduction upon a second trial of the

17. See *infra*, § 590, where the section is quoted in full.

18. *People v. Canfield*, 173 Cal. 309, 159 Pac. 1046.

19. *People v. Ingersoll*, 21 Cal. App. 763, 132 Pac. 1052.

20. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670; *People v. Fice*, 97 Cal. 459, 32 Pac. 531, holding the application was properly refused,

especially when the party did not produce the affidavit of the witness by whom the newly discovered facts were to be shown.

1. *People v. Buck*, 151 Cal. 667, 91 Pac. 529 (holding a limit of one hour is not an abuse of discretion).

2. Pen. Code, § 1182.

3. Pen. Code, § 1180.

testimony of the defendant given at the first trial has been held to be not prejudicial where it contained no confession or admission which would tend to establish guilt.⁴

§ 463. **Discretion of Court.**—A motion for new trial is addressed to the sound legal discretion of the trial court, and its action will not be disturbed upon appeal except in an instance manifesting a clear and unmistakable abuse of such discretion.⁵ This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, as to which an enlarged discretion is committed to the trial court,⁶ because of the disfavor with which such applications have always been regarded.⁷ This discretion is to be exercised in determining the diligence shown,⁸ the truth of the matters stated,⁹ and the mate-

4. *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389.

5. *People v. Canfield*, 173 Cal. 309, 159 Pac. 1046; *People v. Clarke*, 130 Cal. 642, 63 Pac. 138; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236.

6. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Jailles*, 146 Cal. 301, 79 Pac. 965; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Clarke*, 130 Cal. 642, 63 Pac. 138; *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Mitchell*, 129 Cal. 584, 62 Pac. 187; *People v. Tallmadge*, 114 Cal. 427, 46 Pac. 282; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Mesa*, 93 Cal. 580, 29 Pac. 116; *People v. Cesena*, 90 Cal. 381, 27 Pac. 300; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295; *People v. Merkle*, 89 Cal. 82, 26 Pac. 642; *People v.*

Sutton, 73 Cal. 243, 15 Pac. 86; *People v. Chang Wang*, 1 Cal. Unrep. 272; *People v. Lopez*, 34 Cal. App. Dec. 562, 197 Pac. 144; *People v. Purio*, 33 Cal. App. Dec. 413, 194 Pac. 74; *People v. Dewar*, 33 Cal. App. Dec. 150, 193 Pac. 156; *People v. Bones*, 35 Cal. App. 429, 170 Pac. 166; *People v. Lim Foon*, 29 Cal. App. 270, 155 Pac. 477; *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808; *People v. Kwpr Singh*, 11 Cal. App. 427, 105 Pac. 423; *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

7. See *supra*, § 452.

8. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

9. *People v. Bryne*, 160 Cal. 217, 116 Pac. 521; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Merkle*, 89 Cal. 82, 26 Pac. 642; *People v. Vitro*, 36 Cal. App. Dec. 144, 201 Pac. 610; *People v. Sullivan*, 3 Cal. App. 502, 86 Pac. 834.

riality and probability of the effect of them if believed to be true.¹⁰ The question as to whether the evidence produced on the motion is such as to render a different result probable is one peculiarly addressed to the discretion of the trial judge.¹¹

§ 464. Where Verdict is Contrary to Evidence.—A motion for a new trial on the ground that the verdict is contrary to the evidence is addressed to the discretion of the trial court.¹² In passing upon such a motion, a trial judge is called upon to determine whether there is evidence sufficient to support the verdict.¹³ Upon such hearing it is the right and duty of the trial judge to consider the credibility of the witnesses, and to pass upon the probative value of the testimony submitted in proof of the charge, and to grant a new trial if he entertains a well-founded opinion that the result reached by the jury is not justified by the evidence.¹⁴ In other words, he may scrutinize the testimony by the aid of those tests by which a jury are required to measure the worth and weight of the proofs adduced, and grant a new trial if he reaches the conclu-

See *supra*, § 460, as to filing of counter-affidavits.

10. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. McDonell*, 47 Cal. 134; *People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812; *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586.

11. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812.

12. *People v. Brooks*, 90 Cal. 174, 27 Pac. 72; *People v. Hotz*, 73 Cal. 231, 14 Pac. 856 (where a new trial

was granted); *People v. Mallicoat*, 27 Cal. App. 355, 149 Pac. 1000.

13. *People v. Mallicoat*, 27 Cal. App. 355, 149 Pac. 1000.

14. *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Baker*, 39 Cal. 686; *People v. Lejkojes*, 32 Cal. App. Dec. 928, 192 Pac. 160; *People v. Brecker*, 20 Cal. App. 205, 127 Pac. 666; *People v. Martin*, 19 Cal. App. 295, 125 Pac. 919.

The court should grant a new trial when in its opinion the interests of justice demand it. *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657.

sion that the jury must have attached undue weight and credit to the evidence adduced.¹⁵

A defendant may move for a new trial on the ground of the preponderance of evidence in his favor upon some issue material for the prosecution to establish, and the trial court should set aside the verdict if of the opinion that there is such preponderance.¹⁶ A trial judge may grant a new trial although the defendant offers no testimony and the evidence of the prosecution is uncontradicted, as the inherent improbability of a statement may deny it all claims to belief. So also he may grant a new trial although the evidence in the case has a legal tendency to prove the facts, as the evidence may not satisfy the conscience of the judge that a case is made which warrants conviction.¹⁷ Yet it is in not every case of doubt of the justness of the verdict that it should be vacated. The power of the court should be exercised with sound discretion and not arbitrarily.¹⁸ And it should not be exercised in such a captious and over-critical way as to nullify a verdict which rests upon substantial evidence given by credible witnesses. To warrant an order for a new trial, the judge should believe that the verdict is not sustained by the evidence and would result in unjust punishment being inflicted if allowed to stand.¹⁹

II. ARREST OF JUDGMENT.

§ 465. **In General.**—Judgment may be arrested in a criminal case upon the motion of the defendant, or on the court's own motion. A motion in arrest of judgment

15. *People v. Petros*, 25 Cal. App. 44 Pac. 166; *People v. Brecker*, 20 Cal. App. 205, 127 Pac. 666.

16. *People v. Tapia*, 131 Cal. 647, 19. *People v. Mallicoat*, 27 Cal. 63 Pac. 1001; *People v. Ashnauer*, App. 355, 149 Pac. 1000.

47 Cal. 98. The trial judge may refuse to set aside the verdict if the testimony is conflicting. *People v. Honshell*, 44 Pac. 166.

18. *People v. Knutte*, 111 Cal. 453, 10 Cal. 83.

is defined as "an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant, or a plea of former conviction."²⁰ Such a motion must be made and determined before the judgment is pronounced, and when determined, the order must be immediately entered by the clerk in the minutes.¹ The office of the motion is neither more nor less than that of a demurrer interposed after conviction.² And it should specifically state or point out the defects in the indictment or information upon which it is based.³ The right to move in arrest is not waived by moving for a new trial.⁴

The court may, on its own motion, at any time before judgment is pronounced, arrest the judgment for any defects mentioned in section 1185 of the Penal Code, by order for that purpose entered upon its minutes.⁵

§ 466. Grounds for Arrest—Necessity for Demurrer.—

A motion in arrest of judgment can be maintained only upon the grounds enumerated in the statute providing therefor, that is to say, upon "any of the defects in the indictment or information mentioned in section ten hundred and four [of the Penal Code], unless the objection has been waived by a failure to demur."⁶ A motion

20. Pen. Code, § 1185 (in part).

1. See Pen. Code, § 1185; *People v. Gavin*, 33 Cal. App. Dec. 825, 195 Pac. 436 (holding that from the fact that judgment is pronounced it must be assumed that the motion in arrest is denied).

2. *People v. Coronado*, 144 Cal. 207, 79 Pac. 418; *People v. Wilbur*, 33 Cal. App. 511, 165 Pac. 729.

3. *People v. Dick*, 37 Cal. 277.

4. *People v. Clement*, 4 Cal. Unrep. 493, 35 Pac. 1022.

5. Pen. Code, § 1186; *Ex parte Hartman*, 44 Cal. 32.

6. Pen. Code, § 1185; *People v. Cole*, 127 Cal. 545, 549, 59 Pac. 984;

People v. Gardner, 98 Cal. 127, 32 Pac. 880; *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425 (where there was an omission to aver that the thing stolen was the property of another); *People v. Johnson*, 71 Cal. 384, 392, 12 Pac. 261; *People v. McCarty*, 48 Cal. 557; *People v. Indian Peter*, 48 Cal. 250; *People v. Tomskey*, 20 Cal. App. 672, 677, 130 Pac. 184.

Under sections 960 and 1258 of the Penal Code, defects in an indictment or information will not justify a court in arresting the judgment unless they affect a substantial right of the defendant.

based upon any other ground should be denied.⁷ The following, therefore, are not grounds for the arrest of judgment: the lack of jurisdiction to render judgment because of the insufficiency of the statute defining the offense;⁸ irregularities in a preliminary examination and commitment,⁹ or the absence thereof;¹⁰ variance between the pleading and the proof;¹¹ and the present insanity of a defendant.¹² Nor will judgment be arrested where the grand jury took cognizance of the offense and presented an indictment after demurrer sustained to an information with a direction that a new one be filed, the status of the charge being the same as if no information had ever been filed, and the presentation of an indictment under the circumstances being a mere irregularity at most which in no way affected the defendant's rights.¹³ And an order denying a motion to set aside an indictment on the ground that an incompetent person acted as interpreter before the grand jury is not reviewable on a motion in arrest of judgment.¹⁴

Construing section 1185 of the Penal Code with section 1012 of the same code, relating to the waiver of objections if not raised by demurrer, it follows that except as to the

People v. Wynn, 133 Cal. 72, 65 Pac. 126. And this was the rule under the corresponding provisions of the Criminal Practice Act; *People v. Lockwood*, 6 Cal. 205 (holding that an error in the middle name of the victim is not a ground for arresting judgment).

7. *People v. Indian Peter*, 48 Cal. 250 (where the motion was based upon a promise of immunity by a committing magistrate and district attorney).

8. *People v. Gardner*, 98 Cal. 127, 32 Pac. 880.

9. *People v. Chaves*, 122 Cal. 134, 143, 54 Pac. 596; *People v. McConnell*, 82 Cal. 620, 23 Pac. 40; *People*

v. Johnson, 71 Cal. 384, 392, 12 Pac. 261 (where a defendant in custody under a warrant issued by one magistrate was committed by another); *People v. Breshi*, 44 Cal. App. 307, 186 Pac. 361; *People v. Rader*, 24 Cal. App. 477, 141 Pac. 958.

10. *People v. Bowden*, 90 Cal. 195, 27 Pac. 204.

11. *People v. Hughes*, 29 Cal. 257.

12. *People v. Kirby*, 15 Cal. App. 264, 114 Pac. 794.

13. *People v. Whelan*, 117 Cal. 559, 49 Pac. 583.

14. *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

objections to want of jurisdiction and to insufficiency, the objections cannot properly be considered on motion in arrest of judgment unless first raised by demurrer.¹⁵ The defendant cannot, under the California rule, lie by until he sees the result of the trial upon its merits and then be permitted to take advantage of a mere uncertainty in the pleading by a motion in arrest of judgment.¹⁶

§ 467. Determination of Motion and Proceedings Thereafter.—The effect of an order arresting the judgment is to place the defendant in the same situation in which he was before the indictment was found or information filed.¹⁷ If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment or information can be framed upon which he can be convicted, the court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new indictment or information. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution. But if no evidence appears sufficient to charge him with any offense, the arrest of judgment shall operate as an acquittal of the charge upon which the indictment or information was founded.¹⁸

15. *People v. Mead*, 145 Cal. 500, 78 Pac. 1047; *People v. Taylor*, 119 Cal. 113, 51 Pac. 37, 638; *People v. Bryon*, 103 Cal. 675, 37 Pac. 754; *People v. Ross*, 103 Cal. 425, 37 Pac. 379 (objections to matters of substance are not waived by a failure to demur); *People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *People v. Feilen*, 58 Cal. 218, 225, 41 Am. Rep. 258; *People v. Swensen*, 49 Cal. 388; *People v. Shotwell*, 27 Cal. 394;

People v. Bliss, 32 Cal. App. Dec. 249, 190 Pac. 1046.

See *State v. Wehr*, 57 Mont. 469, 188 Pac. 930, citing California cases and holding the objection that the information does not state facts constituting a public offense may be raised by motion in arrest of judgment without a demurrer having been interposed.

16. *People v. Rodley*, 131 Cal. 240, 249, 63 Pac. 351.

17. Pen. Code, § 1187.

18. Pen. Code, § 1188 (stated in substance); *Ex parte Hartman*, 44

S. JUDGMENT AND SENTENCE.

I. TIME TO PRONOUNCE.

§ 468. **In General.**—Section 1191 of the Penal Code provides, in part, as follows:

“After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment which must be not less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment;¹⁹ and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this [the Penal]. code, provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional.”²⁰

The remaining part of section 1191 of the Penal Code was added in 1909, and provides that if, in the opinion of the court there is a reasonable ground for believing a defendant insane, the court may extend the time of pro-

Cal. 32 (holding that if a trial court erroneously overrules a motion in arrest of judgment, it may, within a reasonable time, on its own motion, or upon the application of the party interested, modify or set aside the order and sustain the motion).

19. *People v. Flavin*, 21 Cal. App. 244, 131 Pac. 321 (holding it to be a substantial compliance with the code where the court appoints a time four days after verdict for pronouncing judgment and then continues the time eleven days);

People v. Scott, 13 Cal. App. 301, 109 Pac. 498; *People v. Shedadey*, 12 Cal. App. 648, 108 Pac. 146.

20. Pen. Code, § 1191, as amended in 1911 (Stats. 1911, p. 688); *People v. Lamattina*, 38 Cal. App. 38, 175 Pac. 484 (holding a statement of the court that unless the defendant consented to a postponement, the court would be compelled to pass sentence, is not a threat, and the consent of the defendant in response thereto is within the statute); *People v. Vaughn*, 25 Cal. App. 736, 147 Pac. 116, 117.

nouncing sentence until the question of insanity has been heard and determined, as provided in chapter 6, title 10, part 2, of the Penal Code.¹ A postponement of sentence to await the result of another trial of the defendant for a similar offense has been held to be proper.²

Under section 134 of the Code of Civil Procedure providing that with certain exceptions no court, other than the supreme court, must be open for the transaction of judicial business on holidays, it has been held that a superior court cannot pronounce sentence on a holiday.³

§ 469. Interpretation and Application of Statute.—The time allowed for pronouncing judgment begins to run, not on the day the verdict is rendered or the plea is entered, but with the day immediately succeeding that date.⁴ While the requirement that two days elapse between the verdict and judgment should be observed, any irregularity in pronouncing judgment earlier is not jurisdictional and does not entitle the defendant to his discharge.⁵ However, he may waive the requirement and consent that judgment be pronounced immediately.⁶ And he waives it by failing to object to its nonobservance.⁷

1. See Pen. Code, §§ 1367-1373, as to inquiry into the insanity of the defendant before trial or after conviction. See *infra*, §§ 481, 501.

2. *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498.

It has been held, construing the Criminal Practice Act, that the statute did not require that judgment must of necessity be pronounced at the same term at which the verdict in a criminal case was found. *People v. Felix*, 45 Cal. 163. See *COURTS*, as to abolition of terms of court.

3. *Matter of Smith*, 152 Cal. 566, 93 Pac. 191, following *People v. Soto*, 65 Cal. 621, 4 Pac. 664.

4. *People v. Lamattina*, 38 Cal. App. 82, 93, 175 Pac. 484, per opinion on denial of a rehearing.

5. *Ex parte Mess*, 2 Cal. Unrep. 217.

6. *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116 (quoted in *Hosoda v. Neville*, 45 Mont. 310, 123 Pac. 20). The Montana statute, however, expressly provides for a waiver, but a pronouncement of sentence before the expiration of the statutory period without an express waiver does not render the judgment void. *People v. Robinson*, 46 Cal. 94.

7. See *infra*, § 520.

Extension of time for pronouncing judgment.—An application for a continuance of the time for pronouncing judgment is addressed to the discretion of the trial court.⁸ The court may refuse to postpone the time of pronouncing judgment to procure affidavits of newly discovered evidence which will not constitute ground for a new trial,⁹ or if no showing in support of the application is made.¹⁰ And when the defendant pleads guilty, the court may refuse a postponement to procure evidence of intoxication where the testimony showed his act to have been deliberate, or to procure character evidence as such evidence is inadmissible when the defendant's guilt is admitted.¹¹ The time for pronouncing judgment cannot be postponed beyond the statutory limit, however, even when consented to by the defendant, as the limitation was adopted not as a benefit conferred upon a defendant but as a matter of public policy intended to insure against delay in the infliction of the penalty which the law requires to be imposed.¹²

The provision for the extension of the time for pronouncing judgment not more than ten days when a motion for new trial is submitted means ten days in addition to the five days in which the court must impose sentence. So also in the case of an application for probation, the statute means twenty days in addition to the five-day period.¹³ The provisions for extension of time when a motion for a new trial or in arrest of judgment is made, and for an extension where the question of probation is considered, are not cumulative. Hence, where the defendant does not request a postponement and where the

8. *People v. Saunders*, 13 Cal. App. 743, 110 Pac. 825.

9. *People v. Holmes*, 126 Cal. 462, 58 Pac. 917.

10. *People v. Buck*, 151 Cal. 667, 91 Pac. 529.

11. *People v. Miller*, 114 Cal. 10, 45 Pac. 986.

12. *People v. Winner*, 31 Cal. App. 353, 160 Pac. 689 (where the hearing of a motion for new trial was continued more than fifteen days after conviction with the consent of the defendant).

13. *People v. Lamattina*, 38 Cal. App. 82, 175 Pac. 484.

present insanity is not involved, the latest date to which the court is authorized to extend the time is a day not more than twenty-five days after the date of the return of the verdict.¹⁴ To authorize an extension of time beyond five days and less than fifteen days, it is not necessary that a motion for new trial should actually be pending and undetermined. It is sufficient if it be within the contemplation of the parties.¹⁵ On the other hand, the fact that the motion is made and filed before arraignment for sentence does not rob it of its effect as a motion within the meaning of the statute.¹⁶ Any delay in pronouncing judgment after a plea of guilty is cured where the defendant withdraws his plea and then when it is re-entered the court pronounces judgment within the statutory period.¹⁷

Section 1191 of the Penal Code does not apply to a case where a judgment is pronounced within the statutory period but is for some reason erroneous. In such case the court may in a proper case vacate its judgment and resentence the defendant after the expiration of the statutory period.¹⁸

§ 470. Effect of Noncompliance With Statute.—The code provides that if no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment,

. 14. *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718; *People v. Boling*, 32 Cal. App. 42, 161 Pac. 1169; *People v. Okomoto*, 26 Cal. App. 568, 147 Pac. 598. Compare *People v. Lamattina*, 38 Cal. App. 82, 175 Pac. 484. The district court of appeal said that when an application for probation is denied, and the defendant moves for a new trial, the court may take any reasonable time for disposing of the motion. The supreme court said, however, it is not to be understood

that the time for pronouncing judgment may be postponed beyond the time prescribed in Pen. Code, § 1191.

15. *People v. Treschenko*, 159 Cal. 456, 114 Pac. 578.

16. *People v. Bernard*, 21 Cal. App. 56, 130 Pac. 1063.

17. *People v. Creitsner*, 25 Cal. App. 647, 145 Pac. 109.

18. *In re Lee*, 177 Cal. 690; *People v. Scott*, 39 Cal. App. 128, 178 Pac. 298; *In re Germino*, 38 Cal. App. 497, 175 Pac. 489.

why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it may be continued pursuant to the provisions of this code, then the defendant shall be entitled to a new trial. Likewise, the defendant shall be entitled to a new trial, in cases where the court refuses to hear a defendant's motion for a new trial, or when made it neglects to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same may have been continued under the provisions of the code.¹⁹ While section 1191 limiting the time for pronouncing judgment is mandatory, a delay beyond the statutory period does not have the effect of ousting the court of further jurisdiction to proceed in the case.²⁰ Nor does it authorize the issuance of a writ of prohibition to restrain the trial court from proceeding further in the cause, or render a dismissal necessary.¹ It merely entitles the defendant to a new trial² upon demand therefor.³ Where the court refuses an application for a new trial and renders judgment after the expiration of the time limited, its action is erroneous and subject to reversal upon appeal,⁴ but the judgment would not for that reason be void or subject to collateral attack.⁵ If the defendant does not move or demand a new trial be-

19. Pen. Code, § 1202 (stated in substance); *In re Lee*, 177 Cal. 690, 171 Pac. 958 (holding the statute is not applicable to a case in which a sentence has been pronounced, but under a statute not applicable to the case); *People v. Boling*, 32 Cal. App. 42, 161 Pac. 1169; *People v. Lamattina*, 38 Cal. App. 93, 91, 175 Pac. 484, holding this provision is not violative of article IV, section 25, of the constitution, forbidding special laws regulating the practice of courts of justice. See *supra*, § 469.

20. *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718; *People v. Rhodes*, 17 Cal. App. 791, 121 Pac. 935; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

1. *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718.

2. *People v. Gilbreth*, 33 Cal. App. 23, 164 Pac. 18.

3. See *infra*, this section.

4. *People v. Gilbreth*, 33 Cal. App. 23, 164 Pac. 18; *People v. Winner*, 31 Cal. App. 352, 160 Pac. 689.

5. *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718.

cause of the delay, the court may rightfully enter judgment.⁶

II. SUSPENSION OF SENTENCE.

§ 471. Power of Court—Validity of Statute.—There is considerable conflict of authority in the different states as to the inherent power of a court to suspend indefinitely the imposition or execution of a sentence upon a defendant who has pleaded guilty to, or who has been convicted of a crime.⁷ In California it has been said that the power to suspend indefinitely the imposition of sentence is wholly statutory,⁸ although it has been held that if a suspension of sentence until further order of court is granted on the motion of the defendant, he will not be heard to complain of it.⁹ While there is authority to the effect that courts have inherent power to stay execution of a sentence,¹⁰ it is pointed out by the supreme court of the United States, in a recent case, that no such inherent power exists. The only power existing at the common law was a power to temporarily suspend the imposition of sentence or its execution to the end that pardon might be procured or that a violation of law in other respects might be prevented.¹¹ Aside from this, the matter of

6. *People v. Okomoto*, 26 Cal. App. 568, 147 Pac. 598; *People v. Palich*, 25 Cal. App. 464, 143 Pac. 1065.

7. See 8 *Ruling Case Law*, p. 247.

8. *People v. O'Donnell*, 37 Cal. App. 192, 197, 174 Pac. 102.

9. *People v. Patrich*, 118 Cal. 332, 50 Pac. 425.

10. See *In re Collins*, 8 Cal. App. 367, 97 Pac. 188, where the court says that the practice of staying execution was recognized and followed in England, where there was no appeal as a matter of right from a conviction for crime. For this

reason, it is said by the courts of some jurisdictions to follow that, unless otherwise provided by statute, the power to stay execution exists in the court, and being exercised for the benefit of the defendant, will be presumed to have been done with his consent. See, also, *Ex parte Slattery*, 163 Cal. 176, 124 Pac. 856, where it is said that the inherent power of the court is satisfactorily treated in the *Collins* case.

11. *Ex parte United States*, 242 U. S. 27, 44, 61 L. Ed. 129, 37 Sup. Ct. Rep. 72. See, also, *People v.*

suspending the imposition and execution of sentence has, since 1903, been regulated in California by express statute; that is to say, by section 1203 of the Penal Code. And the application of the rule *expressio unius est exclusio alterius* justifies the conclusion that the courts have only such power as is conferred by the statute.¹² Nothing which cannot be found in the statute or which is not reasonably and fairly or necessarily within the reason, or spirit or intent thereof can be imported into it by the courts.¹³

§ 472. Probation Generally.—Section 1203 of the Penal Code clothes a trial court with the authority of admitting any person over the age of eighteen who has pleaded guilty to or been convicted of any crime, to probation upon certain specified conditions. As amended in 1903, this section empowered the court to suspend the imposing of sentence where the punishment was imprisonment alone, and to suspend the execution of sentence where the sentence was to pay a fine with imprisonment in the alternative.¹⁴ As amended in 1911, the court was authorized in any case not only to suspend the sentence but to suspend the execution of sentence.¹⁵ But the code provision does not confer an unrestrained and unlimited power upon the court, and the power granted should be exercised in conformity with the statute.¹⁶ A petition for probation is addressed to the discretion of the trial court.¹⁷ The con-

O'Donnell, 37 Cal. App. 192, 197, 174 Pac. 102, where the court says the power to stay execution is wholly statutory.

12. *People v. Mendosa*, 178 Cal. 509, 173 Pac. 998; *Ex parte Slatery*, 163 Cal. 176, 124 Pac. 856; *People v. O'Donnell*, 37 Cal. App. 192, 174 Pac. 102; *In re Collins*, 8 Cal. App. 367, 97 Pac. 188.

13. *People v. O'Donnell*, 37 Cal. App. 193, 174 Pac. 102.

14. *Ex parte Moore*, 12 Cal. App. 161, 107 Pac. 129; *In re Collins*, 8 Cal. App. 367, 97 Pac. 188.

15. *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831.

16. *Ex parte Slatery*, 163 Cal. 176, 124 Pac. 856.

17. *People v. Dunlap*, 27 Cal. App. 460, 470, 150 Pac. 389; *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868; *People v. McKay*, 122 Cal. 628, 55 Pac. 594 (decided before the

sent of the district attorney to probation is not required.¹⁸ If the court grants the petition, it should place the defendant in charge of a probation officer, but its action will not be invalidated because it omits to do so.¹⁹ The statute, however, contemplates that the defendant, while on probation, is to be at large, and the court has no authority, when suspending the execution of sentence, to direct that he be confined in jail.²⁰

It has been held in California that it is competent for the legislature to confer upon the courts the power to admit to probation persons who have pleaded guilty to or have been convicted of a crime and for that purpose to suspend the imposition or execution of sentence; and that its enactment in nowise impairs the functions of the executive.¹

Suspension in case of minor.—Section 1388 of the Penal Code provides in part as follows:

“Final judgment may be suspended on any conviction, charge, or prosecution of a minor, for misdemeanor or felony, where in the judgment of the court in which such proceeding is pending there is reasonable ground to believe that such minor may be reformed, and that a commitment to prison would work manifest injury in the premises.”²

§ 473. When Probation may be Granted—Duration of Probationary Term.—Section 1203 of the Penal Code is to be construed in connection with section 1191 of the same code limiting the time for pronouncing judgment

amendment of this section in 1903 and holding it to be discretionary with the court whether to hear evidence in mitigation of punishment).

18. *People v. Peeples*, 32 Cal. App. 279, 162 Pac. 653.

19. *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831.

20. *People v. Mendosa*, 178 Cal. 509, 173 Pac. 998.

1. *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831. See *infra*, § 473, as to granting probation.

2. See *Boys & Girls' Aid Society v. Reis*, 71 Cal. 627, 12 Pac. 796, holding that a police court is a court within the meaning of the provision authorizing the court to direct payment of expenses of maintenance.

and providing "that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this code, provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional." Thus construed, it is clear that the court's power to suspend the execution of sentence expires with the pronouncing of a judgment followed by or accompanied by no order of suspension. The court has no power to act upon a petition for suspension of execution of sentence after affirmance of a judgment of conviction upon appeal.³

Duration of probationary term.—Under section 1203 of the Penal Code a court may, as a general rule, place a defendant upon probation for the full maximum term of sentence possible,⁴ or for a less period. In the latter case, the court has power, to enlarge the probationary term within the limits of the statute at any time before the expiration of the probationary term.⁵ When a defendant is placed on probation without limitation as to time the same extends to the maximum term of sentence and no longer. The court has no power thereafter to enforce its original judgment.⁶

§ 474. Revocation of Order and Enforcement of Judgment.—Subdivision 4 of section 1203 of the Penal Code provides that

"The court shall have power at any time during the term of probation to revoke or modify its order of suspension, of imposition or execution of sentence."

3. *Beggs v. Superior Court*, 179 Cal. 130, 175 Pac. 642.

4. *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831, holding, under the former practice, that the court might place the defendant on probation for the full maximum term of sentence possible, even though it

imposed a sentence of imprisonment of less duration.

5. *Ex parte Sizelove*, 158 Cal. 493, 111 Pac. 527.

6. *Ex parte Slattery*, 163 Cal. 176, 124 Pac. 856; *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831.

Under this provision the court may, whether the defendant be present in or absent from the court at the time, revoke the order of suspension upon a sufficient showing that he has violated any of the terms and conditions upon which such order was made.⁷ And it cannot issue a commitment for one whose sentence has been legally suspended until after such revocation or modification.⁸ But as indicated by the language of the section quoted, the jurisdiction to make such revocation is limited to the period of probation. And as the statute makes no exceptions to this rule, it follows that this jurisdiction is not extended by the fact that the defendant may have left the state and thereby placed himself beyond the jurisdiction of the court. Section 802 of the Penal Code extending the time for finding indictments when the defendant is absent from the state does not directly apply to such a case, and cannot reasonably be made to do so by analogy.⁹

If for any reason an order suspending execution of a sentence is void, and there is no statute to the contrary, the defendant may be rearrested as an escape and ordered into custody upon the unexecuted judgment, as the invalidity of the order will not affect the original judgment.¹⁰

III. MATTERS PRECEDING PRONOUNCEMENT OF SENTENCE.

§ 475. Determining Degree of Crime upon Plea of Guilty.
Section 1192 of the Penal Code provides that

“Upon a plea of guilty of a crime distinguished or divided into degrees, the court must before passing sentence, determine the degree.”¹¹

7. *People v. O'Donnell*, 37 Cal. App. 192, 174 Pac. 102; *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831.

8. *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831.

9. *People v. O'Donnell*, 37 Cal. App. 192, 174 Pac. 102.

10. *In re Collins*, 8 Cal. App. 367, 97 Pac. 188.

11. *People v. Miller*, 137 Cal. 642, 70 Pac. 735 (holding that the record

This section is mandatory, and a compliance therewith is essential to the proper pronouncement of judgment,¹² even in those cases where the plea of guilty specifies the degree.¹³ But when the court has once determined the degree of the crime, there is no occasion for a second examination after a vacation of the judgment already rendered and before the pronouncement of a second judgment.¹⁴

Time of inquisition.—The statute does not require that the proceedings to ascertain the degree of crime shall be had at the time of or immediately after the plea of guilty. And the inquisition is not within the operation of provisions requiring a certain time to elapse between the plea or verdict of guilty and the pronouncing of judgment.¹⁵

Trial by jury.—The proceeding to determine the degree of the crime after a plea of guilty is not a trial as no issue is joined upon which there can be a trial. Consequently the statute directing the court to determine the degree is not violative of defendant's constitutional right to a trial by jury.¹⁶

§ 476. Manner of Determining Degree.—While the statute does not prescribe any manner by which a court is to determine the degree of crime, it impliedly contemplates a judicial determination of the question on evidence.¹⁷

showed that the court inquired into the degree of the crime and did not try the defendant); *Ex parte Woods*, 5 Cal. Unrep. 149, 41 Pac. 796 (holding that a judgment reciting that the defendant was convicted of burglary in the first degree is valid, although the minutes of the court are silent as to whether evidence to prove the degree was heard, and that in such case the recitals in the judgment control).

12. *People v. Bellon*, 180 Cal. 706, 182 Pac. 420; *People v. Jefferson*,

52 Cal. 452 (prosecution for burglary); *People v. Paraskevopolis*, 42 Cal. App. 325, 183 Pac. 585.

13. *People v. Paraskevopolis*, 42 Cal. App. 325, 183 Pac. 585.

14. *People v. Cosgrove*, 32 Cal. App. Dec. 981, 192 Pac. 165.

15. *People v. Noll*, 20 Cal. 164.

16. *People v. Chew Lan Ong*, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186; *People v. Noll*, 20 Cal. 164.

17. *People v. Bellon*, 180 Cal. 706, 182 Pac. 420; *People v. Chew Lan*

The proper course to be pursued is for the court to receive such competent evidence from the respective parties as is material to the question of degree and after the conclusion thereof to pronounce its determination thereon. Evidence of guilt need not be admitted as this is admitted by the plea. The defendant cannot be compelled to give evidence in the matter, but he may waive his privilege. If he does, he should be sworn or required to make his affirmation as provided in the code, but a failure to do so is waived if no objection is made.¹⁸ The voluntary admission by the defendant that he is guilty of a particular degree of the crime charged is a sufficient predicate to uphold the determination of the degree.¹⁹ But the court is not bound to accept the testimony of the defendant as true.²⁰ As no form is prescribed in which the determination of the degree of guilt may be expressed, any decision or judgment which shows the conclusion derived is a compliance with the statute.¹

§ 477. Inquiry as to Cause of Criminal Conduct.—Section 1192a of the Penal Code provides that

“Before judgment is pronounced upon any person convicted of an offense punishable by imprisonment in the state prison, it shall be the duty of the court, assisted by the district attorney, to ascertain in a summary manner, and by such evidence as is obtainable, whether such person has learned and practiced any mechanical or other trade, and also such other facts tending to indicate the causes of the criminal character or conduct of such convicted person, or calculated to be of assistance to the court in determining the proper punishment of such person, or to the state board of prison directors in the performance of the duties imposed upon it by law, as the court shall deem proper.”

Ong, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186; *People v. Paraskevo-*
polis, 42 Cal. App. 325, 183 Pac. 585.

18. *People v. Bellon*, 180 Cal. 706,
182 Pac. 420.

19. *People v. Paraskevopolis*, 42
Cal. App. 325, 183 Pac. 585.

20. *People v. Cosgrove*, 32 Cal.
App. Dec. 981, 192 Pac. 165.

1. *People v. Noll*, 20 Cal. 164.

This provision also provides for a filing of a statement of the views of the court and district attorney and the report of the probation officer and for the transmission of copies thereof and of the testimony taken to the proper prison authorities.²

§ 478. Proof in Aggravation or Mitigation of Punishment.—Prior to 1903, section 1203 of the Penal Code provided as follows:

“After a plea or verdict of guilty where a discretion is conferred upon the court as to the extent of punishment, the court, upon the oral suggestion of either party that there are circumstances either in aggravation or mitigation of the punishment, may in its discretion, hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.”

The existing section sets forth in detail the procedure for the suspension of sentence and the release of the defendant on probation.³ Section 1204 of the Penal Code remains as originally enacted in 1872, and reads as follows:

“The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.”⁴

2. See Pen. Code, § 1192a.

3. See Pen. Code, § 1203, and the various subdivisions thereof relating to suspension of sentence, bonds, opportunity to pay fines, revocation or modification of the court's order of suspension of sentence, termination of period of probation and dis-

charge of the defendant when his good conduct and reform shall warrant it, duties of probation officers, etc.

4. See supra, § 17, as to ignorance of the law as a circumstance in mitigation of punishment. See CONTEMPT, vol. 5, p. 930, as to mitiga-

It has been held that this section does not pretend to prescribe the quantum or character of evidence essential to proof of a prior conviction when such conviction is pleaded in the indictment. Its manifest object is to authorize the court, after a conviction and before sentence pronounced, to receive testimony either in mitigation or aggravation of the punishment to be imposed. To this end any testimony bearing upon the character or antecedents of the convicted person—whether he has theretofore been of good or bad character, or borne a good or bad reputation or whether he has been previously convicted of some offense against the law—may be presented to the court.⁵

IV. FORMALITIES IN PASSING SENTENCE.

§ 479. Presence of Defendant.—It is provided by the code that

“For the purpose of judgment, if the conviction is for felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence.”⁶

It is not necessary that the defendant be present when the court appoints a day for passing sentence,⁷ or orders judgment to be entered *nunc pro tunc*;⁸ it is only necessary in felony cases, that he be present when judgment is pronounced.

“When the defendant is in custody, the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so.”⁹

“If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for

tion in cases where the defendant has paid a fine or suffered imprisonment under an order adjudging also his act a contempt.

5. *People v. Rudolph*, 28 Cal. App. 683, 153 Pac. 721.

6. Pen. Code, § 1193.

7. *People v. Bealoba*, 17 Cal. 389, 399; *People v. Galvin*, 9 Cal. 115.

8. *People v. Lenon*, 79 Cal. 631, 21 Pac. 967.

9. Pen. Code, § 1194.

judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the clerk to issue a bench-warrant for his arrest."¹⁰

§ 480. Arraignment of Defendant for Judgment.—The code specifically provides that

“When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him and of his plea and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.”¹¹

Prior to the adoption of section 4½ of article VI of the constitution, it was held that this provision was mandatory, and that a substantial compliance therewith was essential to the validity of a judgment.¹² It was further held that an arraignment was not waived by the action of defendant's counsel in moving for a new trial before arraignment.¹³ At the present time, it seems that a non-compliance with the statute, while error, will not justify a reversal unless from an examination of the entire record it appears that a miscarriage of justice has resulted.¹⁴ A defendant is sufficiently informed of the “nature of the charge” against him if the court states the specific crime

10. Pen. Code, § 1195. See Pen. Code, § 1196, as to the duty of the clerk, on the application of the district attorney, to issue a bench-warrant into one or more counties; § 1197, as to the form of the bench-warrant; § 1198, as to the service of the bench-warrant; and § 1199, as to the duty of the officer pursuant to the command thereof.

11. Pen. Code, § 1200. See *People v. Perez*, 87 Cal. 122, 25 Pac. 262, holding that the record showed a full compliance with the statute. See *Ex parte Gibson*, 31 Cal. 619, 91

Am. Dec. 546, construing a similar provision in the Criminal Practice Act.

12. *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *People v. Jung Qung Sing*, 70 Cal. 469, 11 Pac. 755.

13. See *People v. McGregor*, 88 Cal. 140, 26 Pac. 97, “assuming” the section to be mandatory. *People v. Walker*, 132 Cal. 137, 64 Pac. 133.

14. See *People v. Wademan*, 38 Cal. App. 116, 137, 175 Pac. 791, distinguishing *People v. Walker*, 132 Cal. 137, 64 Pac. 133.

with which he is charged.¹⁵ It has been held that a mistake in stating the nature of the charge is without prejudice when the defendant makes a motion in arrest of judgment, as the motion warrants the presumption that he knows the nature of the charge.¹⁶

§ 481. Insanity as a Cause Against the Judgment—Other Causes.—Section 1201 of the Penal Code provides in substance that the defendant may show that he is insane, for cause against the judgment; and if, in the opinion of the court, there is reasonable ground for believing him insane, the question of insanity must be tried before judgment is pronounced. If, upon the trial of that question, the jury finds that he is sane, judgment must be pronounced, but if they find him insane, he must be committed to the state hospital for the care and treatment of the insane, until he becomes sane; and when notice is given of that fact, to the sheriff and district attorney of the county, he must be brought before the court for judgment.¹⁷

Under this provision a court need not summon a jury to try the question of the sanity of the defendant at the time of imposition of sentence unless it entertains a doubt as to his sanity.¹⁸ If it appears that the only evidence of insanity is such as may be denominated as slight evidence, the court may deny an inquisition.¹⁹ The sole object of an inquisition ordered pursuant to this provision

15. *People v. Jung Qung Sing*, 70 Cal. 469, 11 Pac. 755.

16. *People v. Johnson*, 71 Cal. 384, 12 Pac. 261.

17. See *supra*, § 272, as to inquest into insanity.

18. *People v. Oppenheimer*, 156 Cal. 733, 746, 106 Pac. 74; *People v. Pico*, 62 Cal. 50; *People v. Kirby*, 15 Cal. App. 265, 114 Pac. 794, holding that a refusal of the court to

suspend judgment in face of objection is a sufficient indication that the mind of the court is free from any doubt as to defendant's sanity.

19. *People v. Knott*, 122 Cal. 410, 55 Pac. 154, holding a short affidavit of counsel for the defendant upon information and belief that they believed the defendant to be insane is too slight evidence to warrant an appellate court in reversing an order denying an inquisition.

of the code is not to determine whether a defendant was insane, at the time of the commission of the crime of which he has been convicted, but whether he is insane when arraigned for judgment. As in the case of insanity precluding a trial of a defendant, the test of insanity precluding a court from adjudging one to punishment is whether the defendant's mind is in such a condition that he cannot rightly comprehend his own condition with reference to the proceedings against him, and that he is then unable to present in a rational manner any defense he may have either on motion for new trial or to the pronouncing of judgment. Under the well-settled rule in California, the burden rests upon the defendant to prove he was so insane, and that by a preponderance of evidence. The evidence given by the defendant on the trial is admissible to show his mental condition at the time of the trial, since this is a matter material to the question of his present sanity.²⁰

If the defendant has good cause to offer, either in arrest of judgment or for a new trial, the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.¹ If no sufficient cause is alleged or appears to the court, at the time fixed for pronouncing judgment, why judgment should not be pronounced, it must thereupon be rendered.²

V. REQUISITES AND VALIDITY OF JUDGMENT.

§ 482. In General.—There is no form prescribed in the Penal Code as to what the judgment itself shall contain.³

20. *People v. Lawson*, 178 Cal. 722, 731, 174 Pac. 885.

2. Pen. Code, § 1202.

3. *People v. Terrill*, 133 Cal. 120,

1. See Pen. Code, § 1201 (subd. 2). See *supra*, § 465 et seq., as to arrest of judgment, and § 442 et seq., as to new trial.

65 Pac. 303; *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572.

Section 1207 of the Penal Code requires the clerk to enter the judgment in the minutes, and annex together and file certain papers which constitute a record of the action.⁴ Since the papers mentioned in the code provision, when annexed together and filed, are expressly declared to be the record of the action, it has been held that it is not necessary that the judgment itself should repeat the contents of any of the other papers. As against an objection that the judgment is void, the only material parts of the judgment are the statements of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers, and the sentence of the court.⁵ The "judgment," involving the pronouncement of sentence is generally orally rendered and delivered, and is usually in informal language, and the law requires it to be no more than that. If the judgment with sufficient clearness shows that it is the pronouncement of sentence by the court upon the verdict as returned, and the penalty imposed by such sentence is authorized by the statute under which the conviction was had, then the judgment satisfies the demand of the statute.⁶

Certainty and definiteness.—The judgment must be upon its face certain and definite in its terms, so that it may be known what punishment the prisoner is to suffer.⁷ When there is such an uncertainty in the judgment as to

4. See *infra*, § 490, where this provision is quoted.

5. *People v. Terrill*, 133 Cal. 120, 65 Pac. 303 (applying to an appeal the rule laid down in *Ex parte Ring*, 28 Cal. 252); *People v. Kelly*, 120 Cal. 271, 52 Pac. 587 (all that is necessary is that the judgment shall sufficiently express what is adjudged; it need contain no recital of facts upon which it is based); *Ex parte Williams*, 89 Cal. 421, 426, 26 Pac. 887; *Ex parte Raye*, 63

Cal. 491; *Ex parte Simpson*, 47 Cal. 127; *Ex parte Murray*, 43 Cal. 455 (followed in *Ex parte Mogensen*, 5 Cal. App. 596, 90 Pac. 1063); In the *Matter of Ring*, 28 Cal. 247; *Ex parte Haase*, 5 Cal. App. 541, 90 Pac. 946; *People v. Camp*, 42 Cal. App. 845, 183 Pac. 845.

6. *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845. See *supra*, § 437, as to judgment on special verdict.

7. *Ex parte Murray*, 43 Cal. 455.

the name of the defendant that it could not be pleaded in bar of a subsequent prosecution, the defect is fatal.⁸

§ 483. Determination of Punishment.—The Penal Code provides as follows: The several sections of the Penal Code which declare certain crimes to be punishable as therein mentioned, “devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment described.”⁹ And it is a rule that whenever the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by the code.¹⁰ These provisions are impliedly repealed by the indeterminate sentence law so far as they are inconsistent therewith. But since the indeterminate sentence law is *ex post facto* as to offenses committed prior to its enactment, the code provisions above referred to are in force as to such offenses.¹¹

In passing sentence, the court cannot impose a penalty either greater or less than that fixed by the statute violated.¹² And when a statute authorizes a judgment of fine *or* imprisonment, the court has no power to impose a sentence of fine *and* imprisonment.¹³ But a judgment which is greater than the maximum prescribed by the statute,¹⁴ or less than the minimum,¹⁵ although erroneous,

8. *People v. Ah Cow*, 17 Cal. 101.

9. Pen. Code, § 12.

10. Pen. Code, § 13.

11. *In re Lee*, 177 Cal. 690, 171 Pac. 958; *In re Bouchard*, 38 Cal. App. 441, 176 Pac. 692; *People v. Pope*, 37 Cal. App. 656, 174 Pac. 673. See *supra*, § 8.

12. *People v. Riley*, 48 Cal. 549.

13. *Ex parte Gilmore*, 71 Cal. 624, 12 Pac. 800.

14. *In re Morck*, 180 Cal. 384, 181 Pac. 657; *People v. Conley*, 27 Cal.

App. 362, 150 Pac. 412, 413. See *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86 (*quaere*). But see *Ex parte Bernert*, 62 Cal. 524, 534 (questioned in *Ex parte Moon Fook*, 72 Cal. 10, 12 Pac. 803).

15. *In re Reed* (*In re O'Neill*), 143 Cal. 634, 101 Am. St. Rep. 138, 77 Pac. 660 (overruling *Ex parte Bernert*, 62 Cal. 524); *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530 (per *De Haven, J.*, and *Harrison, J.*); *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172.

is not void. Such a judgment is valid for the term authorized by law, and it is the established practice of the supreme court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined.¹⁶

§ 484. Judgment of Imprisonment or Death.—A judgment of imprisonment not under the indeterminate sentence law, must specify with certainty the duration of the imprisonment,¹⁷ but it is held to be the better practice not to fix the time when the term of imprisonment is to commence.¹⁸ A judgment is held sufficiently certain if it directs that the defendant be imprisoned for a stated period “from the date of his incarceration.”¹⁹

A judgment should “direct” that the defendant be imprisoned. But a judgment is not insufficient in form because it “orders and adjudges” that the defendant be punished by imprisonment, etc. The quoted words are a sufficient direction.²⁰

Designation of prison.—The judgment should state the place of confinement.¹ But the fact that a judgment pronounced in open court does not specify the place of imprisonment is immaterial if the judgment as entered is complete in this respect.²

“If the judgment is for imprisonment in the state prison it shall direct that the defendant be taken to the warden of the state prison at San Quentin. Thereafter, and until the termination of the sentence, the state board of prison directors may transfer the defendant from one state

16. In re Morck, 180 Cal. 384, 181 Pac. 657.

17. Ex parte Harrison, 63 Cal. 299 (requisites of judgment under Pen. Code, § 330, prior to the amendment of 1891). See *infra*, § 486, as to practice under indeterminate sentence law.

18. Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546.

19. People v. Burgess, 35 Cal. 115; People v. Hughes, 29 Cal. 257, 263.

20. People v. Johnson, 88 Cal. 171, 25 Pac. 1116; People v. Wheatley, 88 Cal. 114, 26 Pac. 95.

1. Ex parte Gibson, 31 Cal. 619, 627, 91 Am. Dec. 546.

2. People v. Flannelly, 128 Cal. 83, 60 Pac. 690.

prison to the other as in the opinion of the board conditions may require."³

Cumulative sentences.—In case of two convictions of the same person before sentence has been pronounced upon him for either, the court in pronouncing sentence should, under section 669 of the Penal Code, order and have inserted in its judgment a direction that the period of imprisonment on the second sentence should commence at the close of imprisonment under the first.⁴ The fact that a previous sentence is not specified in the judgment and can be ascertained only by referring to the records of the court does not invalidate the judgment.⁵

Sentence of death.—A judgment of death ought not to appoint the day of execution, but should leave that to be appointed in the warrant.⁶ The statute provides how a judgment of death shall be executed. Any directions in addition to the judgment that the defendant suffer death are surplusage and will not vitiate the judgment.⁷ Accordingly, it has been held that a direction to keep the defendant in close confinement has no proper place in the judgment, but such a direction is simply surplusage and harmless.⁸

§ 485. Indeterminate Sentence.—Section 1168, added to the Penal Code in 1917, provides as follows:

3. Pen. Code, § 1202a.

4. *Ex parte Kirby*, 76 Cal. 514, 520, 18 Pac. 655. See *infra*, § 624.

5. *People v. Forbes*, 22 Cal. 135.

6. *People v. Witt*, 170 Cal. 104, 148 Pac. 928; *People v. Bonilla*, 38 Cal. 699; *Ex parte Gibson*, 31 Cal. 619, 627, 91 Am. Dec. 546. See *People v. Daniels*, 1 Cal. 106, per Bennett, J., holding that under the Mexican law, a court of the first instance could not impose a sentence of death.

7. *People v. Brown*, 59 Cal. 345, 357 (per McKinstry, J., concurring, holding that a direction that the defendant be taken to the "place of public execution" is surplusage).

8. *People v. Durrant*, 119 Cal. 201, 208, 51 Pac. 185 (holding that "close confinement" does not mean solitary confinement in the technical sense of that expression, but only secure confinement within the prison walls).

“Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment.”

The section further requires the proper authorities after the expiration of the minimum of imprisonment to determine what length of time, if any, the prisoner shall be confined, and provides for his discharge at such time as may be determined, or at the expiration of the maximum period fixed by law if not sooner released.⁹ This section is known as the indeterminate sentence law. It is not unconstitutional as a delegation of legislative or judicial powers to an executive body as the legislative function is filled by providing the sentence to be imposed, and the judicial branch by the pronouncement of the sentence which the law has annexed to the crime.¹⁰

§ 486. Interpretation and Application of Indeterminate Sentence Law.—The indeterminate sentence law applies to crimes punishable by imprisonment in the penitentiary for any term, including those cases in which the statute defining the offense fixes the minimum punishment but no limit to the duration of such punishment is declared. The maximum in the latter case may be fixed at life imprisonment.¹¹ It also applies to those cases where the statute defining the offense prescribes a maximum but not a minimum penalty. In such a case the prison board is vested

9. See PRISONS AND PRISONERS, as to effect of law upon system of credits for good conduct.

10. In re Lee, 177 Cal. 690, 171 Pac. 958; People v. Razo, 43 Cal. App. 251, 184 Pac. 881.

11. Pen. Code, § 671; People v. Rossi, 37 Cal. App. 778, 174 Pac.

916; People v. Gonzales, 36 Cal. App. 782, 173 Pac. 407. The fact that section 671 specifically refers to the judge pronouncing the sentence as having a discretion as to the extent of the punishment does not alter the legal aspect of the case.

with a discretion in the matter of determining the duration of the imprisonment from the maximum term prescribed to the smallest fraction of time.¹² But it has no application to cases where the law prescribes a straight, definite term during which a prisoner shall serve in prison, and leaves no power or discretion in the court or prison board to fix any other or different sentence.¹³ Nor does it apply to crimes committed before it went into effect.¹⁴

Form of sentence.—Under the indeterminate sentence law, the judgment of the trial court properly consists of a recital of the offense of which the defendant stands convicted, a designation of the state prison to which he is committed and nothing more.¹⁵ It is not necessary that any specification of a penalty be made,¹⁶ and the sentence, being in legal effect a sentence for the maximum term of imprisonment fixed by the statute violated, is not void for uncertainty.¹⁷ It is error to fix a minimum term when the statute prescribing the punishment provides no minimum term,¹⁸ though the error does not render the judgment void.¹⁹ So also where the statute defining a felony

12. *Ex parte Denecke* (Cal. App.), 200 Pac. 53; *Ex parte Carlton*, 35 Cal. App. Dec. 438, 200 Pac. 51. In this connection it must be noted that section 18a of the Penal Code, adopted in 1919, fixes the minimum punishment for all felonies thereafter committed.

13. *Ex parte Carlton*, 35 Cal. App. Dec. 438, 200 Pac. 51; *Ex parte Heath*, 33 Cal. App. Dec. 389, 194 Pac. 68.

14. See *supra*, § 8.

15. *People v. Mendosa*, 178 Cal. 509, 173 Pac. 998.

16. *Ex parte Carlton*, 35 Cal. App. Dec. 438, 200 Pac. 51; *People v. Purio*, 33 Cal. App. Dec. 413, 194 Pac. 74 (holding a judgment was

proper which directed the defendant to be confined in the state prison, "pending the determination of the proper authorities as to when you shall be released"); *People v. Young*, 38 Cal. App. 492, 176 Pac. 696; *People v. Rossi*, 37 Cal. App. 778, 174 Pac. 916; *People v. Lee*, 36 Cal. App. 323, 334, 172 Pac. 158, 162.

17. *In re Lee*, 177 Cal. 690, 171 Pac. 958.

18. *People v. Mendosa*, 178 Cal. 509, 173 Pac. 998.

19. *Ex parte Carlton*, 35 Cal. App. Dec. 438, 200 Pac. 51 (where the court holds that a judgment fixing the sentence from nothing to five years was not void, and if the

prescribes no maximum, it is error, in view of section 671 of the Penal Code, for the court to fix a maximum punishment at a term of years less than life.²⁰

§ 487. Judgment Directing Imprisonment for Nonpayment of Fine.—Section 1205 of the Penal Code, as amended in 1891, provides as follows:

“A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted.”²¹

This statute is applicable only to judgments which impose a fine only.²² If a sentence of both fine and imprisonment is imposed, the court cannot impose the alternative

prison board was without authority to fix the length of time during which the prisoner should suffer punishment, the court could correct its judgment); *People v. Wademan*, 38 Cal. App. 116, 137, 175 Pac. 791; *People v. Lee*, 36 Cal. App. 323, 334, 172 Pac. 158.

20. *People v. Rossi*, 37 Cal. App. 778, 174 Pac. 916; *People v. Gonzales*, 36 Cal. App. 782, 173 Pac. 407.

1. Pen. Code, § 1205; *Ex parte Erdmann*, 88 Cal. 579, 26 Pac. 372 (the imprisonment cannot extend beyond term for which the defendant might be sentenced); *People v. Goscinsky*, 34 Cal. App. Dec. 869; 198 Pac. 40; *People v. Weir*, 10 Cal. App. 460, 102 Pac. 539 (holding that a fine of five hundred dollars with an alternative of two hundred and fifty days in the county jail is legal under Pen. Code, §§ 265 and 1205). See *Ex parte Wadleigh*, 82

Cal. 518, 521, 23 Pac. 190, per McFarland, J., and Patterson, J. (decided in 1890, and doubting the power of the court to imprison the defendant beyond the maximum term prescribed by the statute). See *infra*, § 618. See *CONTEMPT*, vol. 5, p. 931, as to the rule in cases of contempt.

The Criminal Practice Act contained a similar provision. *Ex parte Kelly*, 28 Cal. 414 (decided in 1865 and holding that the term of imprisonment may exceed the term for which the defendant might be sentenced).

2. *Ex parte Harrison*, 63 Cal. 299, holding the statute is not applicable to a prosecution under a statute prescribing a punishment of fine and imprisonment until payment of the “fine and costs.” Followed in *Ex parte Sing Ah Tong*, 84 Cal. 165, 24 Pac. 181.

punishment until the fine is satisfied.³ If, however, it should do so, the judgment is valid except as to the part providing for imprisonment in default of the payment of the fine.⁴ And the prisoner cannot be discharged while that portion of the judgment imposing imprisonment as a punishment is in force, whatever may be his rights regarding the portion relating to the fine.⁵ There is an exception to this rule, however, where the law violated provides for punishment by fine and imprisonment and also provides for imprisonment for nonpayment of the fine.⁶ This statute merely prescribes the maximum rate of imprisonment, leaving the court full discretion to fix any rate within that maximum which seems to be just.⁷

Place of imprisonment.—When the court imposes a fine as punishment, the crime charged is reduced to the grade of a misdemeanor, and it cannot impose imprisonment in the state prison as a means of enforcing payment.⁸ Moreover, the court has no jurisdiction to impose hard labor as a part of the punishment; and this would be the effect of its judgment sentencing the defendant to state prison, as all persons imprisoned therein are required to labor.⁹

3. *People v. Brown*, 113 Cal. 35, 45 Pac. 181; *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298; *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372; *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59; *People v. Pera*, 36 Cal. App. 292, 306, 171 Pac. 1091. See *Ex parte Neustadt*, 82 Cal. 273, 23 Pac. 124, not deciding the question but doubting the correctness of *People v. Righetti*, 66 Cal. 184.

4. *People v. Brown*, 113 Cal. 35, 45 Pac. 181; *Ex parte Mitchell*, 70 Cal. 1, 11 Pac. 488; *People v. Pera*, 36 Cal. App. 292, 306, 171 Pac. 1091 (on rehearing); *People v. Kerr*, 15 Cal. App. 273, 114 Pac. 584.

5. *Ex parte Mitchell*, 70 Cal. 1,

11 Pac. 488; *In re Johnson*, 6 Cal. App. 734, 93 Pac. 199; *In re Johnson*, 6 Cal. App. 734, 93 Pac. 199.

The court is not required to allow the defendant any definite period of time before imprisonment in which to raise the money to pay the fine. *Ex parte Henshaw*, 73 Cal. 486, 497, 15 Pac. 110.

6. See *infra*, § 639.

7. *Ex parte Soto*, 88 Cal. 624, 627, 26 Pac. 530.

8. *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190; *Ex parte Arras*, 78 Cal. 304, 20 Pac. 683; *In re Sullivan*, 3 Cal. App. 193, 84 Pac. 781.

9. *Ex parte Arras*, 78 Cal. 304, 20 Pac. 683.

§ 488. Sufficiency of Judgment of Imprisonment in Default of Crime.—It is not requisite that a judgment rendered under section 1205 of the Penal Code follow the exact language of the statute. A substantial compliance therewith is sufficient.¹⁰ And so it has been held that a direction in a judgment that “in default of the payment of said fine” the defendant be imprisoned, not exceeding a designated time, is equivalent to the language of the statute that he “be imprisoned until the fine be satisfied,” and is sufficient.¹¹ The judgment should specify the term of imprisonment, although a failure to do so does not render it void.¹² Since the imprisonment may on any day be brought to an end by payment of the fine, it is manifest that the statute can only mean that the maximum of the imprisonment be specified or named with certainty.¹³

A defendant is entitled to his discharge upon payment of the fine. However, it is not required that the judgment contain a recital to that effect.¹⁴ And the courts by a judicial construction of the statute have determined that where he has served a portion of the term of imprisonment, he is entitled to his discharge upon payment of the balance of the fine not satisfied by imprisonment at the rate specified.¹⁵ Within this rule it has been held that a judgment is valid: that the defendant “pay a fine of thirty dollars or serve fifteen days in jail”;¹⁶ or that he be imprisoned “at the rate of two dollars a day until the fine be paid”;¹⁷ or assessing the amount of the fine

10. *Ex parte Ellis*, 54 Cal. 204. And see cases cited *infra*.

11. *Ex parte Henshaw*, 73 Cal. 486, 496, 15 Pac. 110; *Ex parte Ellis*, 54 Cal. 204.

12. *People v. Markham*, 7 Cal. 208.

13. *Ex parte Ellis*, 54 Cal. 204.

14. *Ex parte Ellis*, 54 Cal. 204.

15. *Ex parte Henshaw*, 73 Cal. 486, 496, 15 Pac. 110; *Ex parte*

Kelly, 28 Cal. 414. See *Ex parte Ellis*, 54 Cal. 204 (*quære*).

It is not necessary that the judgment so provide in express terms if that is its legal effect. *Ex parte Riley*, 142 Cal. 124, 75 Pac. 665; *Matter of Application of Robbins*, 27 Cal. App. 677, 151 Pac. 14.

16. *Ex parte Riley*, 142 Cal. 125, 75 Pac. 665.

17. *Ex parte Kelly*, 28 Cal. 414.

and adjudging that in default of the payment of the fine the defendant be imprisoned until the fine is paid, such imprisonment not to exceed one day for each and every dollar of said fine that shall so remain unpaid.¹⁸

§ 489. Where There are Several Counts.—Where two or more offenses are sufficiently charged in separate counts of the indictment or information, and separate verdicts on each is rendered, there is no impropriety, at least in the absence of objection, in rendering a separate judgment upon each verdict.¹⁹ If no evidence is introduced in support of one of the counts, and the jury return a general verdict of guilty, it is the duty of the trial court to apply the general verdict to the count supported by the evidence, and a general verdict and judgment will be upheld upon the presumption that the court did its duty in this respect.²⁰ If one of the counts is bad, and the court holds both to be good, and if a general verdict and judgment are rendered, the presumption must be that the verdict and judgment are based upon both, and hence the judgment is erroneous.¹

VI. ENTRY OF JUDGMENT AND RECORD OF ACTION.

§ 490. In General.—It is provided by the code that

“When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if any, and must, within five days, annex together and file the following papers, which con-

18. *Ex parte Henshaw*, 73 Cal. 486, 494, 15 Pac. 110.

19. *People v. Schwartz*, 43 Cal. App. 696, 185 Pac. 686.

20. *People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. Shotwell*, 27 Cal. 394.

1. *People v. Garnett*, 129 Cal. 364, 61 Pac. 1114; *People v. Turner*, 113 Cal. 278, 45 Pac. 331; *People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. Mitchell*, 92 Cal. 590, 28 Pac. 597, 788 (distinguished in *People v. Peterson*, 17 Cal. App. 734, 121 Pac. 703).

stitute a record of the action: 1. The indictment or information, and a copy of the minutes of the plea or demurrer; 2. A copy of the minutes of the trial; 3. The written instructions given, modified, or refused, with the indorsements thereon, and the certified transcript of the charge of the court; and, 4. A copy of the judgment.”²

This code section does not require the proceedings before the committing magistrate to be inserted in the record or permit them to be annexed thereto.³ And it is not necessary that the record show that the court heard evidence and determined the degree of the offense, after a plea of guilty.⁴ Prior to 1905, when the phrase “and the certified transcript of the charge of the court” was added to the code provision, the charge of the court given on its own motion was not part of the judgment-roll.⁵

The entry of judgment should be made immediately after the rendition of judgment. If not entered at that time, the clerk probably has power to enter the judgment *nunc pro tunc* without an order of court. At all events, the court may afterwards order the judgment entered *nunc pro tunc* without the presence of the defendant.⁶

§ 491. Statement of Offense.—The entry of judgment should state “briefly the offense for which the conviction was had.”⁷ The object of this requirement is to afford a defendant protection against a second prosecution for the same offense,⁸ and to show that the court has acted within its jurisdiction in the matter of admeasurement of

2. Pen. Code, § 1207. See *infra*, § 617, as to entry of fact of prior conviction.

3. *People v. Shubrick*, 57 Cal. 565,

4. *Ex parte Haase*, 5 Cal. App. 541, 90 Pac. 946.

5. *People v. Hart*, 44 Cal. 598, cited in *People v. Flahave*, 58 Cal. 249 (per McKinstry, J., concurring).

6. *People v. Lenon*, 79 Cal. 631, 21 Pac. 967.

7. Pen. Code, § 1207; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86 (holding offense of selling liquor without a license was sufficiently designated). See *infra*, § 617, entry of prior conviction.

8. *People v. Terrill*, 133 Cal. 120, 124, 65 Pac. 303; *People v. Barnnovich*, 16 Cal. App. 427, 117 Pac. 572.

the punishment inflicted.⁹ Inasmuch as the statement of the offense in the entry made by the clerk is part of the judgment,¹⁰ a failure to observe the provision of the statute in this respect has the effect of rendering the judgment informal and consequently erroneous.¹¹ The judgment need not state the facts constituting the offense of which the defendant was convicted,¹² or state where the crime was committed,¹³ and the omission to describe the offense with technical precision will not render the judgment erroneous,¹⁴ especially where it appears that the court adopts the verdict of the jury as a part of the judgment and imposes sentence accordingly.¹⁵ It has been held that if the judgment states the general offense for which the defendant was convicted, it is not insufficient, as against an objection that the judgment is void, because it does not designate the degree of crime.¹⁶ The judgment need contain no recital of the particular offense for which the conviction is had, it being sufficient if it states generally that the defendant was convicted of a felony or misdemeanor, as the case may be.¹⁷ Indeed, as against this objection, the judgment is sufficient if the

9. *Ex parte Gibson*, 31 Cal. 619, 628, 91 Am. Dec. 546; *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912.

10. *People v. Eppinger*, 114 Cal. 350, 46 Pac. 97; *People v. Johnson*, 71 Cal. 384, 12 Pac. 261, followed in *People v. Kelly*, 120 Cal. 271, 52 Pac. 587, and holding a recital of prior conviction is by statute made a part of the judgment, the omission of which renders the judgment erroneous.

11. *People v. Kelly*, 120 Cal. 271, 52 Pac. 587.

12. *Matter of Ring*, 28 Cal. 247.

13. *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116.

14. *People v. Higuera*, 122 Cal. 466, 55 Pac. 252 (holding a judg-

ment sufficient which states that the defendant had been convicted of "seduction"); *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845; *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912 (holding that a failure to declare the intent with which the act was done did not vitiate the judgment).

15. *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572.

16. *People v. McNulty*, 93 Cal. 427, 444, 26 Pac. 597, 29 Pac. 61; *Matter of Brown*, 32 Cal. 48.

17. *Ex parte Murray*, 43 Cal. 455; *Ex parte Monckros Von Vetsera*, 7 Cal. App. 136, 93 Pac. 1036.

entry shows the offense charged, and that the defendant was tried and convicted of some offense within the charge.¹⁸

§ 492. Conformity to Indictment and Verdict.—The statement of the offense in the judgment must conform to the indictment or information and the verdict.¹⁹ Even though the penalty for the offense charged and for that named in the judgment is the same, a variance in this respect is not merely a technical error; the judgment must be set aside and a proper judgment rendered and entered.²⁰ A judgment and sentence which is excessive because for a greater crime than that specified in the verdict is absolutely void.¹ But the mere omission by the court in passing sentence to state or describe the offense with technical precision does not render the judgment either void or voidable.² And it has been held that a judgment is not fatally defective where the indictment, verdict, minutes, and judgment, taken together, furnish complete protection against a second prosecution for the same offense.³

§ 493. Amending and Correcting Record.—As in civil cases, a court in criminal cases has inherent power to cause its acts to be correctly set forth in its records, and correct its record in accordance with the facts.⁴ And this

18. *Ex parte Gibson*, 31 Cal. 619, 628, 91 Am. Dec. 546, followed in *People v. Burgess*, 35 Cal. 115.

19. *People v. Eppinger*, 114 Cal. 350, 46 Pac. 97; *People v. Johnson*, 71 Cal. 384, 12 Pac. 261, cited in *People v. Eppinger*, 109 Cal. 295, 298, 41 Pac. 1037.

20. *People v. Eppinger*, 114 Cal. 350, 46 Pac. 97; *People v. Johnson*, 71 Cal. 384, 12 Pac. 261 (where a defendant was charged and convicted of embezzlement, and the court adjudged him guilty of grand larceny).

1. *Ex parte Ah Chow*, 40 Cal. 426.

2. *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845. See *supra*, § 491.

3. *People v. Terrill*, 132 Cal. 120, 64 Pac. 894 (holding that the statement as to the contents of the judgment made in *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037 was obiter dictum, and that the opinion in the same case in 114 Cal. 353, 46 Pac. 97, proceeds upon the theory that the court had directed the contents of the judgment).

4. *People v. Ward*, 141 Cal. 628,

power is not lost by mere lapse of time.⁵ But the court cannot, under the form of an amendment of its records, make of record a judgment that was never in fact given.⁶ Though an application to amend should be on notice to the adverse party, a court may amend its records, at any time, on its own motion or on motion of an interested party with or without notice where a clerical misprision has occurred of which the record affords the evidence.⁷ In such case it may order the amendment without further proof.⁸ If the contents of the entry do not afford satisfactory evidence of the mistake and of the order made or judgment made, proof aliunde may be necessary, if the recollection of the judge cannot be invoked; and there is some question as to the right to resort to the recollection of the judge.⁹

VII. VACATION OF JUDGMENT—WRIT OF CORAM NOBIS.

§ 494. **Vacation of Judgment and Resentence.**—When a judgment is erroneous, the trial court which rendered it may vacate it and render another and different judgment before execution has been entered thereupon,¹⁰ but not

75 Pac. 306 (entry *nunc pro tunc*); *Ward v. Dunne*, 136 Cal. 19, 68 Pac. 105 (per Harrison, J., concurring). *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037; *People v. Castro*, 1 Cal. Unrep. 284; *People v. McNulty*, 93 Cal. 427, 444, 26 Pac. 597, 29 Pac. 61 (holding that a court may amend its minutes *nunc pro tunc* to show that the defendant was properly arraigned for judgment); *People v. Murback*, 64 Cal. 369, 30 Pac. 608. See *People v. Silva*, 154 Cal. 556, 98 Pac. 543 (holding that a motion to amend a judgment by inserting

matters not properly a part of it should be denied); *People v. Boero*, 13 Cal. App. 686, 110 Pac. 525 (where the entry was amended by inserting the word "years" after the figure "20").

5. *People v. Ward*, 141 Cal. 628, 75 Pac. 306.

6. *Ward v. Dunne*, 136 Cal. 19, 68 Pac. 105.

7. *People v. O'Brien*, 4 Cal. App. 723, 89 Pac. 438.

8. *People v. Ward*, 141 Cal. 628, 75 Pac. 306; *People v. O'Brien*, 4 Cal. App. 723, 89 Pac. 438.

9. *People v. Ward*, 141 Cal. 628, 75 Pac. 306. See *COURTS*.

10. *People v. Thompson*, 4 Cal.

afterwards.¹¹ When the judgment imposes a fine, its enforcement, within the rule, commences the moment it is rendered and entered. Accordingly, when a judgment erroneously provides for imprisonment in the state prison as a means to enforce payment of a fine, the court cannot afterwards provide for imprisonment in the county jail.¹²

When a sentence is void, the superior court has power, within a reasonable time,¹³ to vacate its former judgment and sentence and impose a proper judgment and sentence, even though the defendant has served a part of his sentence under the void judgment.¹⁴

§ 495. Where Indeterminate Sentence has Been Improperly Imposed.—The courts have held that a judgment under the indeterminate sentence law imposed for a crime committed prior to its enactment is void.¹⁵⁻¹⁶ In such case the prisoner may be taken before the superior court which rendered the judgment and resented,¹⁷

238 (holding a court may amend its judgment at any time before judgment signed); *Matter of Application of Long*, 30 Cal. App. 442, 158 Pac. 1056.

11. *Ex parte Moon Fook*, 72 Cal. 10, 12 Pac. 803; *People v. Conley*, 27 Cal. App. 362, 150 Pac. 412, 413; *In re Sullivan*, 3 Cal. App. 193, 84 Pac. 781.

12. *In re Sullivan*, 3 Cal. App. 193, 84 Pac. 781.

13. *Ex parte Gilmore*, 71 Cal. 624, 12 Pac. 800.

14. *People v. Woods*, 84 Cal. 441, 23 Pac. 1119 (where the court was misled as to the status of the case by counsel and accepted a plea of guilty of a lesser offense after reversal of an order granting a new trial); *Ex parte Gilmore*, 71 Cal. 624, 12 Pac. 800 (where the court imposed both fine and imprison-

ment under a statute authorizing only a fine or imprisonment).

15-16. *In re McCready*, 179 Cal. 514, 177 Pac. 459; *In re Fritz*, 179 Cal. 415, 177 Pac. 157; *People v. Booth*, 37 Cal. App. 650, 174 Pac. 685 (holding that such a judgment is "in a legal sense no judgment at all"). Compare *People v. Votaw*, 38 Cal. App. 714, 177 Pac. 485 (holding that such a judgment is erroneous, but not void, and directing the trial court to resentence the defendant). And see *In re Germino*, 38 Cal. App. 497, 176 Pac. 701, as to the jurisdiction of the trial court to resentence a defendant where an indeterminate sentence is erroneous or invalid for the reason that the crime was committed before the indeterminate sentence law took effect.

17. *In re McCready*, 179 Cal. 514, 177 Pac. 459; *People v. Scott*, 39

even though the defendant has served part of the sentence under the void judgment,¹⁸ or has applied to a federal court for a release on habeas corpus and the application is pending.¹⁹ Moreover, the rule applies even though the time limited by section 1191 of the Penal Code for pronouncing judgment has lapsed.²⁰ A defendant who has been resentenced under this rule has not been put twice in jeopardy for the same offense.¹ When in such case the defendant invokes the remedy by habeas corpus, the course to be pursued is not to discharge, but to remand him for the imposition of a proper sentence.² And when he is brought before the court for resentence it is not necessary to rearraign him, as provided in section 1200 of the Penal Code.³

In imposing the second sentence the court may consider the nature of the crime, any mitigating circumstances attending or succeeding its commission, and the period of time the defendant had already been incarcerated.⁴

§ 496. Writ of Coram Nobis.—A proceeding by motion to set aside a judgment made after the judgment has been rendered and has become final and after a motion for new

Cal. App. 128, 178 Pac. 298; *In re Germino*, 38 Cal. App. 497, 176 Pac. 701 (holding that where the indeterminate sentence does not apply, the omission to fix a term of imprisonment is a mere irregularity, which is subject to correction); *People v. Booth*, 37 Cal. App. 650, 174 Pac. 685.

18. *In re McCready*, 179 Cal. 514, 177 Pac. 459.

19. *In re McCready*, 179 Cal. 514, 177 Pac. 459 (holding that section 766 of the Revised Statutes of the United States is not applicable, for the reason that the superior court in treating its first judgment as void and in proceeding to impose a

second sentence is not acting in any matter pending or in process of being heard and determined in the federal court).

20. See *supra*, § 469.

1. *In re Fritz*, 179 Cal. 415, 177 Pac. 157 (overruling *In re Bouchard*, 38 Cal. App. 441, 176 Pac. 692); *People v. Gibson*, 31 Cal. App. Dec. 372, 188 Pac. 603.

2. *In re Fritz*, 179 Cal. 415, 177 Pac. 157; *In re Lee*, 177 Cal. 690, 171 Pac. 958; *People v. Gibson*, 31 Cal. App. Dec. 372, 188 Pac. 603.

3. *People v. Gibson*, 31 Cal. App. Dec. 372, 188 Pac. 602.

4. *In re Fritz*, 179 Cal. 415, 177 Pac. 157.

trial has been made, or the time therefor has expired, is in the nature of an application for a writ of coram nobis at common law. This writ did not lie to correct any error in the judgment of the court or to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself; but only to enable the court to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without fault or negligence of the party, was not presented to the court. Under the California practice, where remedies are given by statute which did not exist at common law, the writ is unavailable. These remedies are the right to appeal and to make a motion for a new trial, and where they are provided for, to that extent an application for the writ cannot be entertained. And so it has been held that an application for the writ cannot be predicated upon newly discovered evidence, even though it be alleged that the evidence was fraudulently suppressed.⁵ But on an application for writ of error coram nobis it has been held that where the proceeding is equivalent to a motion to set aside the judgment and permit the defendant to withdraw his plea of guilty upon the ground that it was entered under duress, the motion will be granted.⁶

5. *People v. Mooney*, 178 Cal. 525, 529, 174 Pac. 325 (citing *Asbell v. State*, 62 Kan. 214, 61 Pac. 690; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; and *State v. Calhoun*, 50 Kan. 523, 34 Am. St. Rep. 141, 18 L. R. A. 838, 32 Pac. 38).

6. *People v. Perez*, 9 Cal. App.

265, 98 Pac. 870. See *People v. Silver*, 154 Cal. 556, 98 Pac. 543, holding the motion to vacate judgment was properly denied as the evidence failed to establish the truth of the charge upon which it was based.

VIII. ENFORCEMENT OF JUDGMENT OR SENTENCE.

§ 497. **Authority for Execution Generally.**—Section 1213 of the Penal Code provides that

“When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution.”

Under a similar provision in the Criminal Practice Act, it was uniformly held that a certified copy of the judgment was a proper and essential form of warrant.⁷ It must be supposed that the framers of the present constitution knew of the earlier holdings, and in readopting the provision from the old constitution intended that it have the same operation.⁸

A defendant who has entered a plea of guilty or who has been convicted of a crime and who desires his sentence to begin, can, if not in custody, compel the issuance of the commitment by mandamus.⁹ Or, if he is serving a sentence for a misdemeanor and is sentenced for a felony, he may have a writ of habeas corpus to direct his imprisonment upon such sentence in the proper place that his term may begin to run, in pursuance of section 670 of the Penal Code.¹⁰

Judgment imposing fine.—It is provided by the code as follows:

“A judgment that a defendant pay a fine with or without the alternative of imprisonment constitutes a lien in

7. In the Matter of Brown, 32 Cal. 48; Ex parte Gibson, 31 Cal. 620, 91 Am. Dec. 546; Ex parte Dobson, 31 Cal. 497; In the Matter of Ring, 28 Cal. 247.

8. Ex parte Ahern, 103 Cal. 412, 37 Pac. 390.

9. In re Collins, 8 Cal. App. 367, 97 Pac. 188.

10. Ex parte McGuire, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327; In re Collins, 8 Cal. App. 367, 97 Pac. 188. See *infra*, § 498.

like manner as a judgment for money rendered in a civil action."¹¹

"If the judgment is for a fine with or without imprisonment, execution may be issued thereon as on a judgment in a civil action."¹²

§ 498. Manner of Executing Judgment.—In a case where the judgment is for imprisonment, or a fine and imprisonment until it is paid, the defendant must forthwith be committed to the custody of the proper officer and by him be detained until the judgment is complied with. Where, however, the court has suspended sentence, or where, after imposing sentence, it has suspended the execution thereof and placed the defendant on probation, the defendant, if over the age of sixteen years, must forthwith be placed under the care and supervision of the probation officer of the court committing him, until the expiration of the period of probation, and the compliance with the terms and conditions of the sentence, or of the suspension thereof. But where the probation has been terminated and the suspension of the sentence, or of the execution thereof revoked, and the judgment pronounced, the defendant must forthwith be committed to the custody of the proper officer and be detained until the judgment be complied with.¹³

"If the judgment is for imprisonment in the state prison, the sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden of the state prison. He must also deliver to the warden the certified copy of the judgment, and take from the warden a receipt for the defendant."¹⁴

The duty of the sheriff is not affected by the fact that the defendant is undergoing imprisonment in the county jail. He is not authorized to surrender the defendant to

11. Pen. Code, § 1206.

12. Pen. Code, § 1214. See FINES
AND EXECUTIONS.

13. Pen. Code, § 1215 (stated in
substance).

14. Pen. Code, § 1216.

the jailer of the county jail to be kept for a term before his delivery to the warden. To allow him to do so would be in effect to impose a cumulative sentence not authorized by law.¹⁵

IX. EXECUTION OF SENTENCE OF DEATH.

§ 499. Warrant.—The Penal Code provides as follows:

“When judgment of death is rendered, a warrant, signed by the judge, and attested by the clerk, under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must be not less than sixty nor more than ninety days from time of the judgment, and must direct the sheriff to deliver the defendant, within ten days from the time of judgment, to the warden of one of the state prisons of this state for execution, such prison to be designated in the warrant.”¹⁶

The warrant mentioned in this code provision is the warden's authority and so far as it recites a legal judgment is his protection. The warrant is not invalidated by surplusage in the judgment,¹⁷ or by surplusage in the warrant itself. For example, it is not invalidated by a direction to the warden that he execute the judgment of death.¹⁸ Since the fixing of the day of execution of a judgment is no part of the judgment, it has been held that a defendant has no constitutional or statutory right to be present when the judge signs the warrant fixing the time and place of his execution.¹⁹ But where the warrant becomes *functus officio* because of the lapse without execution of the time upon which the defendant is to be ex-

15. *Ex parte McGuire*, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327.

16. Pen. Code, § 1217.

17. *People v. Brown*, 59 Cal. 345, 128 Cal. 83, 60 Pac. 670.

18. *People v. Chew Lan Ong*, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186.

19. *People v. Witt*, 170 Cal. 104, 148 Pac. 928; *People v. Flannelly*,

ecuted, a new order under section 1227 of the Penal Code is necessary to authorize the execution of the judgment and by express provision of that section the defendant is entitled to be present at the time of the making of any such order.²⁰

§ 500. Proceedings After Rendition of Sentence of Death.—The judge of the court at which a conviction requiring judgment of death is had must, immediately after the conviction, transmit to the governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.¹ The governor may thereupon require the opinion of the justices of the supreme court and of the attorney general, or any of them, upon the statement so furnished.² No judge, court or officer, other than the governor can suspend the execution of a judgment of death, except the warden of the state prison to whom he is delivered for execution,³ as provided in those sections of the code which relate to the insanity of the defendant, or, in the case where a female against whom a judgment of death has been pronounced is supposed to be pregnant.⁴

§ 501. Proceedings Where Defendant is Believed to be Insane.—It is provided by the code that if, after his delivery to the warden for execution, there is good reason to believe that a defendant, under a judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating

20. *People v. Witt*, 170 Cal. 104, 110, 148 Pac. 928; *People v. Chew Lan Ong*, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186. See *infra*, § 503.

1. Pen. Code, § 1218.

2. Pen. Code, § 1219.

3. Pen. Code, § 1220.

4. See *infra*, § 501, as to defendant believed to be insane, and *infra*, § 502, as to proceedings when female is supposed to be pregnant.

the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his insanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry.⁵ And the district attorney must attend the hearing, and may produce witnesses before the jury.⁶ If by the verdict of the jury it is found that the defendant is insane, the court must direct that he be taken to one of the state hospitals for the insane, and there kept in safe confinement until his reason is restored.⁷ The warden must suspend the execution pending the defendant's insanity, and perform such other duties as the code prescribes. If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant.⁸

§ 502. Proceedings When Female is Supposed to be Pregnant.—The Penal Code provides as follows: In a case where there is good reason to believe that a female against whom a judgment of death is rendered is pregnant, the court may summon three disinterested physicians, of good standing in their profession, to inquire into the supposed pregnancy, who shall, in the presence of the court, but with closed doors, if requested by the defendant, examine the defendant and hear any evidence that may be produced, and make a written finding and certificate of their conclusion, to be approved by the court and spread upon the minutes. The provisions of section twelve hundred and twenty-two apply to the proceedings upon such inquiry.⁹ If it is found that the female is not

5. Pen. Code, § 1221.

6. Pen. Code, § 1222 (in part).

7. Pen. Code, § 1223.

8. Pen. Code, § 1224 (in part).

And see this code section providing that when the defendant re-

covers his reason, the superintendent of such hospital must certify that fact to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment.

9. Pen. Code, § 1225.

pregnant, the warden must execute the judgment; but if it is found that she is pregnant, he must suspend the execution of the judgment, and transmit a certified copy of the finding and certificate to the governor. When the governor receives a certificate from the warden that the defendant is no longer pregnant, he must issue to the warden his warrant appointing a day for the execution of the judgment.¹⁰

§ 503. Proceedings Where Judgment is Unexecuted.—If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of that county, must order the defendant to be brought before it, or if he is at large, a warrant for his arrest may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reason exists against the execution of the judgment, it must make an order that the warden of the state prison execute the judgment at a specified time. The warden must execute the judgment accordingly. From an order directing and fixing the time for the execution of a judgment, as herein provided, there is no appeal.¹¹ The defendant is entitled to be present when the order for his execution is made under this section.¹² When the defendant is brought into court, it is his duty to present any legal reasons why judgment should not be executed,¹³ as, for instance, that a pardon or commutation of sentence has been

10. Pen. Code, § 1226.

11. Pen. Code, § 1227; *People v. Dick*, 39 Cal. 102; *People v. Bonilla*, 38 Cal. 699.

Formerly, when an appeal was allowed from an order directing and fixing a day for execution of a sentence of death, an order fixing a time so short as to deprive a defendant of any opportunity of getting a bill of exceptions before the

supreme court was presumptively erroneous upon its face. *People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078; *People v. Durrant*, 119 Cal. 203, 51 Pac. 185 (explaining same case, 119 Cal. 54).

12. *People v. Sing Lum*, 61 Cal. 538; *People v. Sprague*, 54 Cal. 92. See *supra*, § 499.

13. *People v. Sing Lum*, 61 Cal. 538.

issued by the executive. The court takes judicial notice of the judgment and its legal effect and need not take testimony in respect thereto;¹⁴ and it may refuse to entertain a second motion for new trial.¹⁵ The mere illness and absence of one of defendant's counsel does not require a continuance of proceedings to fix a day for execution.¹⁶

§ 504. Mode of Executing Sentence.—The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.¹⁷ And such judgment must be executed within the walls of one of the state prisons designated by the court by which judgment is rendered. The warden of the state prison where the execution is to take place must be present at the execution and must invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not exceeding five, to be present at the execution, together with such peace officers as he may think expedient, to witness such execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.¹⁸ After the execution the warden must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed.¹⁹

Although there is no provision of law directing the warden to execute a judgment of death except where the judgment remains in force without having been executed,

14. *People v. Durrant*, 119 Cal. 201, 51 Pac. 185.

15. *People v. Sing Lum*, 61 Cal. 538.

16. *People v. Durrant*, 119 Cal. 203, 206, 51 Pac. 185.

17. Pen. Code, § 1228.

18. Pen. Code, § 1229; *People v. Brown*, 59 Cal. 345, 357.

19. Pen. Code, § 1230.

See "Erratum,"
1926 Supp. 614.

the Penal Code designates him as the official who must execute such judgment.²⁰

T. APPEAL AND ERROR.

I. INTRODUCTORY.

§ 505. **Right of Appeal in General.**—The right of appeal in criminal cases is guaranteed by the constitution and is as sacred as the right to a trial by jury. It is one of the means provided by law to determine the guilt or innocence of the accused,¹ and for remedying errors which have occurred in the trial and proceedings in criminal cases.² It is a remedy which is available whether or not the trial court had jurisdiction of the case.³ Void and voidable judgments may be alike reversed on appeal or writ of error,⁴ but the former only gives authority to discharge on habeas corpus.⁵ When the right of appeal is not conferred by the constitution it is within the discretion of the legislature to determine in what cases appeals will be allowed.⁶

When a judgment is rendered against one person but the record shows that another was tried, the latter is sufficiently identified with the proceedings to enable him to appeal.⁷

20. See Pen. Code, §§ 1224, 1226, 1227; *People v. Cheu Lan Ong*, 141 Cal. 550, 99 Am. St. Rep. 88, 75 Pac. 186; *People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078.

1. *Ex parte Hoge*, 48 Cal. 3 (decided under the constitution of 1849).

And see the following cases decided under the constitution of 1879, and citing the *Hoge* case, *supra*: *In re Adams*, 81 Cal. 163,

22 Pac. 547; *Smith v. McCallum*, 36 Cal. App. 143, 172 Pac. 408.

2. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752; *Matter of Application of Drennan*, 33 Cal. App. 193, 164 Pac. 807.

3. *People v. Pingree*, 61 Cal. 141.

4. *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546.

5. See HABEAS CORPUS.

6. *People v. Fowler*, 9 Cal. 85.

7. *People v. Ah Cow*, 17 Cal. 101.

“The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action is not changed in consequence of the appeal.”⁸

§ 506. Law Governing Appeals.—Appeals must be taken in accordance with the statute in force at the time of the rendition or making of the judgment or order appealed from.⁹ Unless a contrary intention appears, a statute changing the mode of taking appeals is not applicable to judgments rendered before it takes effect, but applies only to cases which are pending and undetermined at that time, and to cases arising subsequently thereto. This is especially true where, as in this state, the jurisdiction of the appellate courts over the subject matter of appeals is constitutional and does not depend upon statutory enactment. Under this rule a statute providing that an appeal may be taken by oral announcement in open court at the rendition of a judgment or order does not apply to judgments or orders theretofore rendered.¹⁰

§ 507. Jurisdiction of Appellate Courts.—In order that a court may review a criminal case upon appeal, it is, of course, essential that it have jurisdiction.¹¹ The jurisdiction of the appellate courts is fixed by the constitution, and can neither be restricted nor enlarged by legislative enactment.¹² Under the constitution of 1849 and the revision of 1863, the jurisdiction of the supreme court extended to “all criminal cases amounting to felony, on questions of law alone,” and did not embrace offenses of a lesser grade. In cases of misdemeanor the judgments of the trial court were final whether erroneous or not, except where there was an excess of jurisdiction, in which case

8. Pen. Code, § 1236.

9. *People v. Reese*, 13 Cal. App. 327, 109 Pac. 640.

10. *People v. Nash*, 15 Cal. App. 320, 114 Pac. 1184.

11. *People v. Johnson*, 30 Cal. 98.

See *infra*, § 556, dismissal for want of jurisdiction.

12. *People v. Applegate*, 5 Cal. 295.

only could they be reviewed.¹³ The constitution of 1879, as originally adopted, conferred appellate jurisdiction upon the supreme court "in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone."¹⁴ Since the amendment of the constitution in 1904, the supreme court has appellate jurisdiction "on questions of law alone, in all criminal cases where judgment of death has been rendered." And the district courts of appeal have appellate jurisdiction "on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record excepting criminal cases where judgment of death has been rendered."¹⁵ Although an offense may be punishable by death, the supreme court has not jurisdiction, under the present constitution, unless a judgment of death is actually rendered.¹⁶

Construing the constitution, it has been held that a proceeding by accusation under section 758 or 772 of the Penal Code is a criminal proceeding not prosecuted by indictment or information and, therefore, not within the jurisdiction of the appellate courts,¹⁷ and section 770 of the Penal Code attempting to authorize an appeal is on that account invalid.¹⁸ So also a contempt proceeding is

13. Const., 1849, art. VI, § 4; *People v. Aubrey*, 53 Cal. 427; *People v. Doss*, 39 Cal. 433; *People v. Doss*, 39 Cal. 428 (per Sprague, dissenting); *People v. Apgar*, 35 Cal. 389; *People v. Johnson*, 30 Cal. 98 (the supreme court has no jurisdiction of misdemeanors, either on appeal or writ of error or certiorari); *People v. Burney*, 29 Cal. 459; *People v. War*, 20 Cal. 117; *People v. Cornell*, 16 Cal. 187; *People v. Vick*, 7 Cal. 165; *People v. Shear*, 7 Cal. 139. (The court has no jurisdiction upon writ of error or appeal.) *People v. Applegate*, 5 Cal. 295.

14. *People v. Kuhlman*, 118 Cal.

140, 50 Pac. 382 (holding that the court has no jurisdiction over appeals in misdemeanor cases); *People v. Kalloch*, 60 Cal. 113.

15. Const., art. VI, § 4.

16. *People v. White*, 161 Cal. 310, 119 Pac. 79.

17. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752 (appeal from judgment in favor of informer); *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1 (appeal by accuser); *In re Curtis*, 108 Cal. 661, 41 Pac. 793 (distinguishing *In re Marks*, 45 Cal. 199).

18. *People v. McKamy*, 168 Cal. 531, 143 Pac. 752. See *Larue v.*

not a criminal case prosecuted by indictment or information within the meaning of the constitution.¹⁹ While the constitution confers upon the supreme court appellate jurisdiction in cases at law which involve the validity of any municipal fine, it is settled that this provision does not apply to criminal prosecutions, and, hence, does not confer appellate jurisdiction in a criminal case imposing a fine for the violation of a municipal ordinance.²⁰

II. APPEALABLE JUDGMENTS AND ORDERS.

In What Cases Defendant may Appeal.

§ 508. In General.—The Penal Code provides that an appeal may be taken by the defendant in the following cases:

“1. From a final judgment of conviction; 2. From an order denying a motion for new trial; 3. From any order made after judgment, affecting the substantial rights of the party.”¹

Under this provision a defendant cannot take an appeal from the verdict,² or intermediate interlocutory orders.³ Accordingly an appeal will not lie directly from any of the following orders or proceedings: an order directing

Davies, 8 Cal. App. 750, 97 Pac. 903, not deciding the question. In a few cases in which the right of appeal was not questioned, an appeal from a judgment of removal from office was entertained. *Matter of Shepard*, 161 Cal. 171, 113 Pac. 513; *People v. Ward*, 85 Cal. 585, 24 Pac. 785; *Triplett v. Munter*, 50 Cal. 644.

19. *Tyler v. Connolly*, 65 Cal. 28, 2 Pac. 414. See *CONTEMPT*, vol. 5, p. 954, as to appeals from orders in contempt proceedings.

20. *People v. Pacific Gas & Elec.*

Co., 168 Cal. 496, Ann. Cas. 1917A, 328, 143 Pac. 727; *People v. Johnson*, 30 Cal. 98.

1. Pen. Code, § 1237. See *infra*, § 509.

2. *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113; *People v. Zimmerman*, 11 Cal. App. 115, 104 Pac. 590; *People v. Corey*, 8 Cal. App. 720, 97 Pac. 907.

3. *People v. Clarke*, 42 Cal. 622.

that a charge ignored by one grand jury be submitted to another;⁴ an order overruling a demurrer to an indictment or information;⁵ an order denying a motion to set aside an information;⁶ an order refusing to dismiss a prosecution because of delay in bringing defendant to trial;⁷ a ruling denying a motion for a postponement of the trial;⁸ an order refusing to change the place of trial;⁹ an order overruling a special plea and adjudging that the defendant plead over;¹⁰ an order refusing leave to withdraw a plea;¹¹ an order refusing to issue a commission to take testimony;¹² an order denying a motion in arrest of judgment;¹³ an order suspending judgment and placing

4. *People v. Clarke*, 42 Cal. 622.

5. *People v. Hall*, 45 Cal. 253; *People v. Ah Fong*, 12 Cal. 424.

6. *People v. Simmons*, 119 Cal. 1, 50 Pac. 844; *People v. Izlar*, 8 Cal. App. 600, 97 Pac. 685; *People v. Williams*, 8 Cal. App. 595, 97 Pac. 684.

7. See *supra*, § 280.

8. *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Buck*, 151 Cal. 667, 91 Pac. 529.

9. *People v. Stillman*, 7 Cal. 117.

10. *People v. Thurston*, 5 Cal. 517.

11. *People v. Dabner*, 153 Cal. 398, 95 Pac. 880.

12. *People v. Stillman*, 7 Cal. 117.

13. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Bundy*, 168 Cal. 777, 145 Pac. 537; *People v. Rogers*, 163 Cal. 476, 126 Pac. 143; *People v. Mohr*, 157 Cal. 732, 109 Pac. 476; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Lennen*, 139 Cal. 634, 73 Pac. 586; *People v. Matuszewski*, 138 Cal. 533, 71 Pac. 701; *People v. Cadot*, 138 Cal. 527, 71 Pac. 649; *People v. Jackson*, 138 Cal. 462, 71 Pac. 566; *People v. Ford*, 138 Cal. 140, 70 Pac. 1075; *People v. Walker*, 132

Cal. 137, 64 Pac. 133; *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Burtle*, 123 Cal. 303, 55 Pac. 998; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *People v. Henry*, 77 Cal. 445, 19 Pac. 830; *People v. Majors*, 65 Cal. 100, 3 Pac. 401; *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; *People v. Ah Kim*, 44 Cal. 384; *People v. Holder*, 35 Cal. App. Dec. 326, 199 Pac. 832; *People v. Williams*, 43 Cal. App. 60, 184 Pac. 498; *People v. Bray*, 42 Cal. App. 465, 183 Pac. 712; *People v. Pera*, 36 Cal. App. 292, 306, 171 Pac. 1091; *People v. Peery*, 26 Cal. App. 143, 146 Pac. 44; *People v. Hartman*, 23 Cal. App. 72, 137 Pac. 611; *People v. Merritt*, 18 Cal. App. 58, 122 Pac. 839, 844; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *People v. Robinson*, 17 Cal. App. 273, 119 Pac. 527; *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513; *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401; *People v. Oliver*, 7 Cal. App. 601, 605, 95 Pac. 172; *People v. Mullen*, 7 Cal.

defendant on probation;¹⁴ an order denying a petition for probation;¹⁵ or an order denying a motion to suspend judgment on the ground of insanity.¹⁶ While an appeal lies from an order denying a motion for new trial,¹⁷ no appeal lies from such an order before all the issues of fact have been tried as the code does not contemplate such a motion.¹⁸ A defendant cannot appeal from an order granting him a new trial,¹⁹ or from an order dismissing the prosecution as the order cannot injure him.²⁰ Likewise, a judgment upon a plea of former conviction is not appealable, inasmuch as it is not final judgment of conviction;¹ and a recital in the minutes of the court that sentence was passed is not the judgment of the court from which an appeal may be taken.²

§ 509. Orders After Judgment.—Under the Penal Code, a defendant may appeal from an order made after judgment, affecting the substantial rights of the party.³ Under this provision a defendant may appeal from an order directing the entry of judgment *nunc pro tunc*,⁴ and from an order denying a motion to set aside a judgment and permit a withdrawal of a plea of guilty,⁵ but not from the warrant of execution,⁶ or from a ruling overruling

App. 547, 94 Pac. 867; *People v. Hill*, 1 Cal. App. 414, 82 Pac. 398. See *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907, holding that an appeal does not lie from a "motion" in arrest of judgment.

14. *People v. Hartman*, 23 Cal. App. 72, 137 Pac. 611.

15. *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868.

16. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74.

17. Pen. Code, § 1237, subd. 2, *supra*. See *infra*, § 529.

18. *People v. Majors*, 65 Cal. 100, 3 Pac. 401.

19. *People v. Ah Choy*, 2 Cal. Unrep. 106.

20. *People v. Stokes*, 102 Cal. 501, 36 Pac. 834.

1. *People v. Majors*, 65 Cal. 100, 3 Pac. 401.

2. *People v. Lennon*, 77 Cal. 308, 19 Pac. 521.

3. Pen. Code, § 1237, subd. 3.

4. *Ward v. Dunne*, 136 Cal. 19, 68 Pac. 105.

5. *People v. Perez*, 9 Cal. App. 265, 98 Pac. 870.

6. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670, overruling *People v. Ebanks*, 117 Cal. 652, 666, 40 L. R. A. 269, 49 Pac. 1049.

objections to an order fixing the day of execution.⁷ Formerly, appeals were allowed from orders made pursuant to section 1227 of the Penal Code directing and fixing the time for execution of a judgment of death where for any reason the judgment was not executed within the time fixed.⁸ But in 1905 this section was amended by the addition of a provision to the effect that no appeal could be taken from such order.

Where other remedies exist.—It seems to be a settled rule in California that where an order adverse to a defendant is made and the code affords him some remedy therefor that is more effective and expeditious than an appeal would be, such order is not regarded as one affecting his substantial rights. Accordingly, an order of a trial court revoking a certificate of probable cause and a stay of execution granted by him does not affect the substantial rights of a defendant and is not appealable,⁹ as the defendant may apply to a justice of the appellate court for a certificate of probable cause.¹⁰ Likewise, under the former practice, an order refusing to settle a bill of exceptions was not deemed to affect the substantial rights of a defendant as he had a remedy by writ of mandate.¹¹

§ 510. Orders Refusing to Vacate Prior Orders.—Ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion.¹² An exception

7. *People v. Hurtado*, 2 Cal. Unrep. 206.

8. *People v. Durrant*, 119 Cal. 201, 209, 51 Pac. 185; *People v. Durrant*, 119 Cal. 54, 50 Pac. 1070; *People v. Ebanks*, 117 Cal. 652, 666, 40 L. R. A. 269, 49 Pac. 1049; *People v. McNulty*, 95 Cal. 594, 30 Pac. 963; *People v. Sprague*, 54 Cal. 92.

9. *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813. See cases cited *infra*.

10. See *infra*, § 552.

11. *People v. Jackson*, 138 Cal. 32, 70 Pac. 918.

12. *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *People v. Mayne*, 118 Cal. 516, 522, 62 Am. St. Rep. 256, 50 Pac. 654 (holding that an order refusing to set aside a former order denying a new trial is not appealable). See *APPEAL AND ERROR*, vol. 2, p. 164, for a similar rule in civil appeals.

to this rule exists where a direct appeal would afford no relief by reason of the impossibility of securing a record showing the error complained of. Such is the case where a defendant is sentenced in his absence without a pretense of arraignment, or where a false or erroneous entry in the minutes of the court showing a compliance with the law in sentencing a defendant is made in his absence.¹³ If an ex parte order correcting the minutes of the court so as to conform to the facts is made after judgment, the defendant may move to vacate the order and appeal from the order denying his motion, since this latter order affects his substantial rights.¹⁴

In What Cases People may Appeal.

§ 511. In General.—The legislature has restricted the right of appeal by the people to those certain cases specified in section 1238 of the Penal Code, as follows:

“An appeal may be taken by the people: 1. From an order setting aside the indictment or information; 2. From a judgment for the defendant on a demurrer to the indictment, accusation or information; 3. From an order granting a new trial; 4. From an order arresting judgment; 5. From an order made after judgment, affecting the substantial rights of the people.”¹⁵

Under this provision it has been held that the people cannot appeal from an order of a trial court dismissing a jury when refusing to proceed further in the case.¹⁶

Orders setting aside information and dismissing action. Under the Practice Act, an order setting aside an indictment and discharging the defendant was appealable as a

13. *People v. Walker*, 132 Cal. 137, 64 Pac. 133.

14. *People v. O'Brien*, 4 Cal. App. 723, 89 Pac. 438.

15. *People v. Knowles*, 27 Cal. App. 498, 155 Pac. 137; *People v. Tomskey*, 20 Cal. App. 672, 130 Pac.

184 (treating as an order granting a new trial an order of court setting aside a verdict because of a failure of the defendant to plead).

16. *People v. Depavo*, 39 Cal. App. 336, 178 Pac. 731.

final judgment.¹⁷ But under the Penal Code, no provision was made for an appeal from such an order,¹⁸ until the adoption in 1897 of what is now subdivision 1 of section 1238 of the Penal Code.¹⁹ An order granting a motion to dismiss an action is not an order setting aside an indictment or information within the meaning of the code, and is not appealable.²⁰

§ 512. Order Sustaining Demurrer.—As has been seen, the Penal Code expressly authorizes an appeal from a judgment for the defendant on a demurrer to the indictment, accusation or information.¹ If the district attorney moves for and obtains an order submitting the case to another grand jury, he must be deemed to have acquiesced in the judgment and waived his right of appeal.² But if he asks for no such order and excepts to one made, the right of the people to appeal is not lost merely because

17. *People v. Stacey*, 34 Cal. 307; *People v. Young*, 31 Cal. 564.

18. *People v. Higgins*, 114 Cal. 63, 45 Pac. 1004; *People v. Richter*, 113 Cal. 473, 45 Pac. 811. But see *People v. More*, 68 Cal. 500, 9 Pac. 461, holding the order is a final judgment and appealable.

19. See *supra*, this section.

20. *People v. More*, 71 Cal. 546, 12 Pac. 631; *People v. Hollis*, 65 Cal. 78, 2 Pac. 893; *People v. Solari*, 27 Cal. App. 510, 155 Pac. 141; *People v. Antonetti*, 27 Cal. App. 508, 155 Pac. 141; *People v. Bigelow*, 27 Cal. App. 507, 155 Pac. 142; *People v. Knowles*, 27 Cal. App. 498, 506, 155 Pac. 137 (upon the ruling in the supreme court denying a hearing in that court).

1. Pen. Code, § 1238, subd. 2. See *supra*, § 511.

Under the Practice Act an order sustaining a demurrer was deemed

a final judgment from which an appeal might be taken, because nothing more remained to be done unless the court directed that the case be submitted to another jury; *People v. Ah Own*, 39 Cal. 604 (Wallace, J., and Rhodes, C. J., dissenting). But an order sustaining a demurrer as to the allegation of a felony and leaving the case for trial as to a misdemeanor was not regarded as a final appealable judgment. *People v. Martin*, 47 Cal. 112.

Prior to 1905 there was no provision specifically authorizing an appeal from a judgment sustaining a demurrer to an accusation, and it was held that an accusation was not an indictment within the meaning of the code so as to authorize an appeal. In the *Matter of Burleigh*, 145 Cal. 35, 78 Pac. 242.

2. *People v. Wooster*, 16 Cal. 435.

the court on its own motion directs the submission of the matter to another grand jury.³ No appeal lies from an order, made upon sustaining a demurrer to the indictment, that the district attorney file an information against the defendant.⁴

§ 513. Judgment of Acquittal and Order Advising.—Formerly, the statute attempted to authorize an appeal by the people from an order of court directing the jury to find for the defendant, but inasmuch as the defendant had been once in jeopardy and could not again be tried, where a verdict of acquittal was rendered pursuant to an erroneous direction of verdict, the statute was repealed in 1897. An appeal allowed to the state can authorize a reversal of an erroneous proceeding only in those cases in which the first proceeding did not create a legal jeopardy.⁵ An appeal from a judgment of acquittal because of variance alleging error in failing to direct the filing of a new information will be dismissed as such information may be filed without an order of court.⁶

III. PRESENTING AND RESERVING OBJECTIONS IN TRIAL COURT.

Necessity for Objection and Ruling Thereon.

§ 514. In General.—The purpose of an appeal is to review some action of the trial court; consequently it is necessary to the review of a question that counsel obtain a ruling of the trial court upon it.⁷ Where a technical

3. *People v. Lee*, 107 Cal. 477, 40 Pac. 754. See *People v. Long*, 121 Cal. 494, 53 Pac. 1097 (query, whether an order sustaining a demurrer can be regarded as a final judgment where the case is ordered to be resubmitted).

4. *People v. Specht*, 62 Cal. 537.
5. *People v. Webb*, 38 Cal. 467, 479 (quoting 1 Bishop Crim. Law, § 665).

6. *People v. Allen*, 61 Cal. 140.
7. *People v. Torres*, 38 Cal. 141; *People v. McCauley*, 1 Cal. 379;

error is committed at a trial, the right to object cannot be held in abeyance until the defendant ascertains the nature of the verdict; the right is waived if he fails to avail himself of it when the opportunity was fairly presented.⁸ Accordingly, one cannot object for the first time upon appeal to irregularity in the arraignment,⁹ or to formal defects in the indictment or information,¹⁰ or to errors in the admission of evidence,¹¹ or to irregularities occurring at the trial.¹² So also the mere absence of an expert witness owing to a failure of the sheriff to serve a subpoena upon him is no ground for reversal where no other effort to procure his attendance was made.¹³ But the objection to a want of jurisdiction,¹⁴ or to a failure of the indictment or information to state a public offense,¹⁵ are not waived by a failure to object thereto. These objections may be raised at any stage of the trial by any appropriate step, or they may be urged for the first time upon appeal.

§ 515. Indictment or Information—Variance.—A failure to demur to an indictment or information or move in arrest of judgment constitutes a waiver of all those infirmities appearing upon the face of the pleading which are the subject of a special demurrer.¹⁶ Consequently, in the absence of a demurrer a defendant cannot be heard to complain upon appeal of formal defects in the indictment or information,¹⁷ to ambiguities or uncertainties

People v. Walton, 35 Cal. App. Dec. 316, 199 Pac. 825; *People v. Taminago*, 35 Cal. App. 238, 169 Pac. 696; *People v. Taminago*, 35 Cal. App. 238, 169 Pac. 696. See *infra*, § 561, review of misconduct of the prosecuting attorney in the absence of error by the trial court.

8. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92.

9. *People v. McCauley*, 1 Cal. 379.

10. See *infra*, § 515.

11. See *infra*, § 516.

12. See *infra*, § 520.

13. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202.

14. *People v. Hodges*, 27 Cal. 340; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654.

15. See *infra*, § 515.

16. *People v. Nelson*, 58 Cal. 104; *People v. Gatewood*, 20 Cal. 146.

17. *People v. Parks*, 133 Cal. 3, 65 Pac. 13; *People v. Jim Ti*, 32 Cal. 60; *People v. Souleotes*, 26 Cal. App. 309, 146 Pac. 903; *People v.*

therein,¹⁸ to duplicity,¹⁹ or to defects in the indorsement upon the indictment by the foreman of the grand jury.²⁰ But neither the neglect to demur or move in arrest of judgment can be deemed a waiver of an objection based upon the ground that the indictment or information does not state a public offense. Such an objection might be raised at any point in the progress of a case, or upon appeal.¹

Variance.—An objection to variance between the pleading and proof cannot be made for the first time upon appeal. And when the case is tried on the theory that certain issues are covered by the indictment it is too late to make the point upon appeal, where it does not appear that prejudice resulted to the defendant from any imperfections in the indictment.²

§ 516. Admission of Evidence.—The rule that objections not made in the trial court will not be considered upon appeal applies to the objection that evidence was erroneously admitted. When a question propounded to a witness indicates upon its face that the response to it will be inadmissible, the defendant must interpose an objection before an answer is given, if an opportunity presents itself,³ or, in the absence of such opportunity, he must move

Apple, 7 Cal. 289. See *People v. Dick*, 37 Cal. 277, holding that formal defects not specified in the motion in arrest of judgment will not be reviewed.

18. *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215; *People v. Nesbitt*, 102 Cal. 327, 36 Pac. 654; *Larue v. Davies*, 8 Cal. App. 750, 97 Pac. 903.

19. *People v. Hickey*, 109 Cal. 275, 41 Pac. 1027; *People v. Burgess*, 32 Cal. 115; *People v. Finley*, 27 Cal. App. 291, 149 Pac. 779; *People v. Collins*, 9 Cal. App. 622, 99 Pac. 1109.

20. *People v. McCauley*, 1 Cal. 379.

1. Pen. Code, § 1012; *People v. Smith*, 103 Cal. 563, 37 Pac. 516; *People v. Nelson*, 58 Cal. 104; *People v. Grinnell*, 9 Cal. App. 238, 98 Pac. 681.

2. *People v. Fuski*, 32 Cal. App. Dec. 1038, 192 Pac. 552.

3. *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467; *People v. Farrington*, 140 Cal. 656, 74 Pac. 288; *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *People v. Rangod*, 112 Cal. 669, 44 Pac. 1071; *People v. Northey*, 77 Cal. 618, 634, 19 Pac.

to strike out the answer.⁴ When it cannot be determined from the question asked whether any testimony would be admissible, as where a question is proper and the answer of the witness is unexpected, it is not necessary to interpose an objection before answer.⁵ But the defendant must move to strike out the testimony when its inadmissibility appears.⁶ If he fails to proceed in accordance with this rule, it is presumed that the defendant waives any objection to the evidence he might have interposed thereto, and it must be concluded that he acquiesced in its remaining in the case.⁷ When evidence is admitted at a trial upon condition that it be subsequently connected with other evidence in the case, the burden is upon the person objecting to move to strike it out if the connection be not made, failing to do which he is not in a position to complain of its admission.⁸ And when the court reserves a

865, 20 Pac. 129; *People v. Moan*, 65 Cal. 532, 4 Pac. 545; *People v. Salorse*, 62 Cal. 139; *People v. Anthony*, 56 Cal. 397; *People v. Reinhart*, 39 Cal. 449; *People v. Glenn*, 10 Cal. 32; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 62; *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124; *People v. Correa*, 44 Cal. App. 632, 186 Pac. 1055; *People v. Allison*, 44 Cal. App. 118, 185 Pac. 992; *People v. Gilman*, 43 Cal. App. 453, 185 Pac. 310 (an objection after answer comes too late); *People v. Patterson*, 42 Cal. App. 37, 183 Pac. 209; *People v. Wilson*, 36 Cal. App. 589, 598, 172 Pac. 1116; *People v. Morrell*, 28 Cal. App. 729, 153 Pac. 977; *People v. Kizer*, 22 Cal. App. 11, 18, 133 Pac. 516, 521, 134 Pac. 346; *People v. Fredoni*, 12 Cal. App. 685, 108 Pac. 663; *People v. Cyty*, 11 Cal. App. 702, 708, 106 Pac. 257.

4. See *supra*, § 308.

5. *People v. Williams*, 127 Cal. 212, 59 Pac. 581.

6. *People v. Watson*, 165 Cal. 645, 133 Pac. 298; *People v. Dong Pok Yip*, 164 Cal. 143, 149, 127 Pac. 1031; *People v. Smith*, 151 Cal. 619, 624, 91 Pac. 511; *People v. Lawrence*, 143 Cal. 148, 155, 68 L. R. A. 193, 76 Pac. 893 (cited in *Short v. Frink*, 151 Cal. 83, 87, 90 Pac. 200); *People v. Cole*, 141 Cal. 88, 74 Pac. 547; *People v. Williams*, 127 Cal. 212, 59 Pac. 581; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539; *People v. Carnes*, 33 Cal. App. Dec. 121, 192 Pac. 1088; *People v. Ferrara*, 18 Cal. App. 271, 122 Pac. 1089; *People v. Emmons*, 7 Cal. App. 685, 691, 95 Pac. 1032; *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498. See *People v. Long*, 7 Cal. App. 27, 93 Pac. 387 (holding that an objection to the answer is sufficient within the rule);

7. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

8. *People v. Cook*, 148 Cal. 334, 344, 83 Pac. 43; *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303.

ruling upon an objection or motion to strike out, the defendant must secure a ruling upon his objection or he will be presumed to have waived a ruling.⁹

In accordance with these rules a defendant cannot object for the first time upon appeal that no foundation for certain evidence was laid,¹⁰ or that questions put to character witness were not in proper form.¹¹ Where certain evidence is admitted without objection, an objection to additional evidence along the same line comes too late to avail the appellant.¹²

Repetition of objection.—When a party has once excepted to a line or character of testimony, his right to a review of an alleged error in its admission does not require him to interpose repeated objections to its reception.¹³ And when he has stated the grounds of his objections, he need not repeat them to further questions of the same character.¹⁴ But if an objection to the form of a question is sustained and the question is reframed, the defendant must object to the new question if he would complain upon appeal.¹⁵

Waiver of objection.—A defendant may by his conduct waive objections to evidence interposed by him and in such case he cannot urge them upon appeal.¹⁶ But a mere stipulation that an objectionable document be read to the

9. *People v. Westlake*, 62 Cal. 303.

10. *People v. Evans*, 5 Cal. Unrep. 125, 41 Pac. 444; *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 59 (where no foundation for the admission of an ordinance was laid); *People v. Kirby*, 15 Cal. App. 264, 272, 149 Pac. 794.

11. *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 125.

12. *People v. Correa*, 44 Cal. App. 634, 186 Pac. 1055. See *infra*, § 598.

13. *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838; *People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62, 64.

14. *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229.

15. *People v. Miller*, 122 Cal. 84, 54 Pac. 523.

16. *People v. Silvers*, 6 Cal. App. 69, 74, 92 Pac. 506 (an objection that a confession is involuntary is waived when counsel for the defendant himself offers the confession in evidence for all purposes).

jury instead of being handed to them to inspect and read is not a waiver of an objection to its introduction.¹⁷

§ 517. Sufficiency of Objection to Evidence.—It is a general rule that an appellate court will not consider objections to the admission of evidence, unless the precise ground of objection was clearly specified in the trial court.¹⁸ The efficacy of an objection, as a general rule, depends upon the precision with which it is made.¹⁹ And a party cannot be permitted to abandon the ground of objection taken below and assume another one upon appeal. A defendant is deemed to have waived all grounds of objection not stated by him.²⁰ Likewise, if a portion only of offered evidence is inadmissible, error in its admission will not be reviewed unless an objection to the inadmissible portion was made in the court below.¹ Notwithstanding these general rules, technicalities should be liberally viewed when urged against a defendant in a criminal case. And the mere fact that the objection could have been made in better form will not justify a refusal to consider it, where the intention of the defendant could not be misunderstood.² So also if it is evident from the discussion

* 17. *People v. Powers*, 23 Cal. App. 447, 138 Pac. 373.

18. *People v. Owens*, 123 Cal. 482, 490, 56 Pac. 251; *People v. Warner*, 117 Cal. 637, 49 Pac. 841; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73; *People v. Manning*, 48 Cal. 335; *People v. Frank*, 28 Cal. 507; *People v. Wieland*, 10 Cal. App. 519, 102 Pac. 828.

19. *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734.

20. *People v. Wong Loung*, 159 Cal. 520, 530, 114 Pac. 829; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Manning*, 48 Cal. 335; *People v. McCauley*, 45 Cal. 146; *People v. Porter*, 32 Cal. App.

Dec. 610, 191 Pac. 951; *People v. Holloway*, 28 Cal. App. 214, 151 Pac. 975; *People v. Warr*, 22 Cal. App. 663, 668, 136 Pac. 304; *People v. Brecker*, 20 Cal. App. 205, 217, 127 Pac. 666; *People v. Peter*, 20 Cal. App. 151, 128 Pac. 415; *People v. Brewer*, 19 Cal. App. 742, 127 Pac. 808; *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88; *People v. James*, 5 Cal. App. 427, 90 Pac. 561.

1. *People v. Schafer*, 161 Cal. 573, 119 Pac. 920; *People v. Farmer*, 77 Cal. 1, 18 Pac. 800; *People v. Jones*, 12 Cal. App. 129, 106 Pac. 724.

2. *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315; *People v. Yee Fook Din*, 106 Cal. 163, 39 Pac. 530.

over an objection between the court and counsel that another ground of objection perfectly obvious from the nature of the question, would have been overruled if made, this ground will be considered upon appeal.³

§ 518. General Objection to Evidence.—It is a general rule that a defendant cannot be heard to urge for the first time an objection of any more specific character than that made in the court below.⁴ If, therefore, an objection to testimony is in general terms, that it is irrelevant, incompetent and immaterial, and the objection could have been cured by the party offering the testimony if the reason for it had been given, an appellate court will not notice it.⁵ Accordingly, under this objection it cannot be urged upon appeal that no proper foundation had been laid for the introduction of testimony,⁶ or that the deposition of a witness taken at the preliminary examination was inadmissible because it did not show that the witness was sworn.⁷ Where proffered evidence is imperfect because of the lack of preliminary proof which may or may not be supplied by the party offering the evidence, the objection must be specific and it must point out the alleged defect; if this is not done, the objection cannot be urged upon appeal.⁸

3. *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734.

4. *People v. Hickman*, 113 Cal. 80, 45 Pac. 175.

5. *People v. Owens*, 123 Cal. 482, 490, 56 Pac. 251; *People v. Louie Foo*, 112 Cal. 17, 22, 44 Pac. 453; *People v. Frank*, 28 Cal. 507, 519; *People v. Glenn*, 10 Cal. 33; *People v. Apple*, 7 Cal. 289.

6. *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453; *People v. Baird*, 105 Cal. 126, 38 Pac. 633; *People v. Northey*, 77 Cal. 618, 632, 19 Pac.

865, 20 Pac. 129; *People v. Frank*, 28 Cal. 507.

7. *People v. Ballard*, 13 Cal. App. 511, 110 Pac. 351.

8. *People v. Lamar*, 148 Cal. 564, 576, 83 Pac. 993; *People v. Owens*, 123 Cal. 482, 490, 56 Pac. 251; *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73; *People v. Trent*, 25 Cal. App. 740, 145 Pac. 541 (where under such an objection it was contended that the certificate of the reporter to the testimony at the preliminary examination was not admitted in evidence).

§ 519. Exclusion of Evidence and Offer.—Unlike the rule governing cases where an objection to evidence is overruled, a party seeking to uphold a ruling sustaining an objection may suggest any ground to uphold the action of the court.⁹

Where a question does not show upon its face whether or not it is material, the questioner, in order to reserve an exception to the action of the court in sustaining an objection thereto, must formally reframe the question so that its materiality is apparent.¹⁰ And when a question apparently calls for improper evidence, the defendant cannot complain of a ruling sustaining an objection thereto if he does not state the purpose of the evidence and show its admissibility. If he fails to do so, an appellate court will be unable to determine whether a substantial right of a defendant has been prejudiced by the ruling.¹¹ Mere impatience of the court does not excuse counsel, if he regard the matter of sufficient importance, from submitting a formal statement of what he desires to prove.¹² If an offer is made to prove several things and the court refuses to hear the proof, the ruling must be sustained if proof of any one of the things is inadmissible.¹³

When a court sustains an objection to evidence with the privilege of renewing the offer of the evidence, the defendant cannot complain if he does not renew the offer.¹⁴

9. See *infra*, § 566.

10. *People v. Singh*, 182 Cal. 457, 482, 188 Pac. 987.

11. *People v. Harris*, 169 Cal. 53, 64, 145 Pac. 520; *People v. Babcock*, 160 Cal. 537, 117 Pac. 549; *People v. Wong Loung*, 159 Cal. 520, 532, 114 Pac. 829; *People v. Totman*, 135 Cal. 133, 67 Pac. 51; *People v. Schell*, 123 Cal. 358, 55 Pac. 1006; *People v. Kawasaki*, 23 Cal. App. 92, 137 Pac. 287; *People*

v. Brent, 11 Cal. App. 674, 106 Pac. 110.

12. *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693.

13. *People v. Hogan*, 11 Cal. App. 599, 105 Pac. 938.

14. *People v. Hatch*, 163 Cal. 369, 377, 125 Pac. 907; *People v. Sanford*, 43 Cal. 29; *People v. Huntington*, 8 Cal. App. 612, 622, 97 Pac. 760.

§ 520. Irregularities on the Trial.—The rule that objections not made in the trial court will not be considered upon appeal, is applicable to irregularities occurring at the trial. A defendant cannot object for the first time upon appeal to irregularities in the impaneling of the jury,¹⁵ to a denial of the right to examine jurors on their voir dire in advance of a challenge,¹⁶ to a failure to state in a challenge that the ground therefor was actual bias,¹⁷ to the disqualification of a juror,¹⁸ or to the panel,¹⁹ or to the disqualification of the officer put in charge of the jury.²⁰ So also it cannot be objected for the first time upon appeal that that part of the indictment or information charging a prior conviction was read, notwithstanding the fact the charge was admitted,¹ that a witness was not sworn,² or that he was incompetent,³ or that the jury were allowed to inspect objects referred to in evidence,⁴ or that a view was taken of an object not authorized by the code,⁵ or that the question whether a certain person should be sub-

15. *People v. Johnson*, 104 Cal. 418, 38 Pac. 91.

16. *People v. Trask*, 7 Cal. App. 103, 93 Pac. 891.

17. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181.

18. *People v. Sanford*, 43 Cal. 29; *People v. Stonecifer*, 6 Cal. 405 (overruling *People v. March*, 6 Cal. 543).

A party intending to interpose a challenge for actual bias must allege that the juror is biased against him, and if he fails to do so, he cannot complain upon appeal, even if he show a state of facts upon which the juror probably would have been excluded; *People v. Renfrow*, 41 Cal. 37.

19. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933 (holding that objection which should be taken by a challenge to the panel cannot

be urged for the first time after verdict).

20. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Babcock*, 160 Cal. 537, 117 Pac. 549; *People v. Stennett*, 34 Cal. App. Dec. 783, 197 Pac. 372; *People v. Hamilton*, 32 Cal. App. Dec. 1059, 192 Pac. 469.

1. *People v. Douglass*, 87 Cal. 281, 25 Pac. 417.

2. *People v. Collins*, 5 Cal. App. 654, 91 Pac. 158.

3. Objections to the competency of evidence are insufficient to raise the question as to the competency of the witness testifying. *People v. Singh*, 182 Cal. 457, 483, 188 Pac. 987, limiting *Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223.

4. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

5. *People v. Fitzpatrick*, 80 Cal. 538, 22 Pac. 215.

poenaed was submitted to the jury,⁶ or that a continuance was not granted.⁷ When a trial court fully and fairly charges the jury upon the law appertaining to the facts of the case, the failure of the court to instruct upon any proposition deemed essential by the defendant is not to be regarded as error, unless he made a request for such instruction.⁸ A defendant cannot object for the first time on appeal to the reading of the statute law and decisions of the appellate court as a part of the instructions,⁹ or to a direction to the jury that they find specially in relation to a particular fact,¹⁰ or to any irregularity in transmitting forms of verdict to the jury by the hand of the sheriff,¹¹ or to informality in the verdict as rendered.¹² A defendant objecting to the recordination of the verdict before it is read or declared should put his objection in a form distinctly challenging the attention of the court to the fact that the course pursued would deprive him of his right of polling the jury.¹³ A defendant cannot object for the first time upon appeal to the shortness of time elapsing between verdict and sentence.¹⁴ Nor can he object to the imposition of sentence without having the question of his sanity passed upon by a jury, if he did not suggest such insanity when arraigned for judgment.¹⁵

6. *People v. Ingersoll*, 21 Cal. App. 763, 132 Pac. 1052.

7. When a motion for continuance made at trial is denied without prejudice to renewal, the fact that the motion was not renewed is indicative that no reason therefor exists. *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65.

8. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019. See *supra*, §§ 362, 363.

9. *People v. Galvin*, 9 Cal. 115.

10. *People v. Chu Quong*, 15 Cal. 332.

11. *People v. Hite*, 135 Cal. 76, 67 Pac. 57.

12. *People v. McCauley*, 1 Cal. 379.

13. *People v. Nichols*, 62 Cal. 518.

14. *People v. Barton*, 88 Cal. 176, 25 Pac. 1117; *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116; *People v. Mess*, 65 Cal. 174, 3 Pac. 670; *People v. McCauley*, 1 Cal. 379; *People v. Sykes*, 10 Cal. App. 67, 101 Pac. 20.

15. *People v. Taminago*, 35 Cal. App. 238, 169 Pac. 696.

§ 521. **Argument and Misconduct of Counsel.**—It is a general rule that where an admonition to the jury to disregard misconduct of the district attorney will remove its prejudicial effect, the possible effect upon a jury of improper argument or other misconduct of a district attorney will not be considered upon appeal, unless the defendant promptly called the attention of the court to the alleged impropriety and assigned misconduct thereon, or requested the court to admonish the jury to disregard it.¹⁶ The reason for this rule is that the court should

16. *People v. Routh*, 182 Cal. 561, 189 Pac. 436; *People v. Beggs*, 178 Cal. 79, 92, 172 Pac. 152; *People v. Wong Hing*, 176 Cal. 699, 169 Pac. 357; *People v. Kromphold*, 172 Cal. 512, 522, 157 Pac. 599; *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Fleming*, 166 Cal. 357, 377, Ann. Cas. 1915B, 881, 136 Pac. 291; *People v. Rogers*, 163 Cal. 476, 481, 126 Pac. 143; *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Phelan*, 123 Cal. 551, 569, 56 Pac. 424; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Lyle*, 2 Cal. Unrep. 393, 4 Pac. 977; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 68; *People v. Williams*, 35 Cal. App. Dec. 115, 199 Pac. 56; *People v. Zentgraf*, 33 Cal. App. Dec. 190, 193 Pac. 274; *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318; *People v. Kanngiesser*, 44 Cal. App. 345, 186 Pac. 388; *People v. Vickroy*, 41 Cal. App. 275, 182 Pac. 764; *People v. Tobin*, 39 Cal. App. 76, 179 Pac. 443; *People v. Wilson*, 36 Cal. App. 589, 598, 172 Pac. 1116; *People v. Donaldson*, 36 Cal. App. 63, 171 Pac. 442; *People v. Pedone*, 35 Cal. App. 452, 170 Pac. 170; *People v. De Angelli*, 34 Cal. App. 716, 168 Pac. 699; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396; *People v. Charlie*, 34 Cal. App. 411, 167 Pac. 703; *People v. Fodera*, 33 Cal. App. 8, 164 Pac. 22; *People v. Woodson*, 29 Cal. App. 531, 156 Pac. 378; *People v. Cuin*, 27 Cal. App. 316, 149 Pac. 795; *People v. Souleotes*, 27 Cal. App. 288, 149 Pac. 802; *People v. Panagoit*, 25 Cal. App. 158, 154 Pac. 70; *People v. Kiser*, 24 Cal. App. 540, 547, 141 Pac. 1078; *People v. Carmean*, 23 Cal. App. 396, 138 Pac. 117; *People v. Cromley*, 23 Cal. App. 340, 138 Pac. 123; *People v. Horvath*, 23 Cal. App. 306, 137 Pac. 1069; *People v. Maneuso*, 23 Cal. App. 146, 137 Pac. 278; *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271; *People v. Warr*, 22 Cal. App. 663, 669, 136 Pac. 304; *People v. Kizer*, 22 Cal. App. 10, 19, 133 Pac. 516, 521, 134 Pac. 346; *People v. Metzler*, 21 Cal. App. 80, 130 Pac. 1192; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009; *People v. Osborn*, 12 Cal. App. 148, 106 Pac. 891; *People v. Cowley*, 7 Cal. App.

be given the opportunity to correct the irregularity to prevent any prejudicial effect, if that be possible.¹⁷ There may, of course, be cases in which the act done or remark made is of such a character that a harmful result cannot be obviated by any retraction or instruction. In such case the want of or an insufficient assignment of misconduct will not affect an appellant's rights.¹⁸ Moreover, the attitude or action of the trial court may be such that it would be useless to request that the jury be admonished to pay no heed to the statement of the district attorney.¹⁹

The objection to the misconduct, when necessary, should ordinarily be made promptly, that is, at the time of its occurrence, or it will not be considered upon appeal.²⁰ In case of a repetition of misconduct, each repetition should be objected to, notwithstanding prior objections.¹ But when counsel makes frequent and in many cases unwarranted interruption of argument, and the trial court requires him to make his objections at the conclusion of the argument, objections made at that time will be considered.² When making an objection, it is insufficient merely to note an exception or make a formal objection to the remarks of the district attorney.³ But there is some

501, 94 Pac. 866; *People v. White*, 5 Cal. App. 329, 336, 90 Pac. 471; *People v. Owens*, 3 Cal. App. 750, 86 Pac. 980.

17. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256.

18. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Kizer*, 22 Cal. App. 10, 20, 133 Pac. 516, 521, 134 Pac. 346; *People v. Wright*, 4 Cal. App. 704, 89 Pac. 364.

19. *People v. Edgar*, 34 Cal. App. 459, 470, 167 Pac. 891 (where the court announced to the jury that the sustaining of an objection would suffice to warn them not to be influenced by the question or the answer, and that no more explicit

admonition would be given); *People v. Pitisci*, 29 Cal. App. 727, 738, 157 Pac. 502.

20. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. DeVries*, 35 Cal. App. Dec. 263, 199 Pac. 967; *People v. Hopper*, 42 Cal. App. 499, 183 Pac. 836.

1. *People v. Parrish*, 25 Cal. App. 314, 143 Pac. 546.

2. *People v. Ong Git*, 23 Cal. App. 148, 157, 137 Pac. 283.

3. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690; *People v. Babcock*, 160 Cal. 537, 117 Pac. 549 (where the defendant's counsel merely noted an exception saying

uncertainty in the decisions whether an assignment of misconduct is sufficient to save the objection in the absence of a request for an instruction that the jury disregard the remark. In a late supreme court case it was stated that a mere assignment of error without also requesting such an instruction is insufficient to raise the objection.⁴ If the improper remarks of counsel are associated with statements which are unobjectionable, it is the duty of the defendant to direct the particular attention of the court to the remarks objected to.⁵ A general objection to an improper question is probably insufficient to raise the objection of misconduct in asking it.⁶

§ 522. Misconduct of Court.—The same rule, governing objections to misconduct of counsel, applies to a claim of misconduct on the part of the trial court. A trial court is entitled to have its alleged transgressions called to its attention so that by an admonition to the jury or other suitable mode, any prejudice possibly caused thereby can be immediately removed. In the absence of an assignment of misconduct or request for an admonition to the jury to disregard the objectionable remarks, an appellate court will not pass upon the merits of an objection thereto presented for the first time upon appeal.⁷ The reason for

that there was no evidence of the fact stated). *People v. Shears*, 133 Cal. 154, 65 Pac. 295; *People v. Dadini*, 34 Cal. App. Dec. 394, 196 Pac. 510; *People v. Adkins*, 33 Cal. App. Dec. 324, 193 Pac. 800; *People v. Miller*, 31 Cal. App. Dec. 206, 188 Pac. 52; *People v. Vickroy*, 41 Cal. App. 275, 182 Pac. 764; *People v. Wademan*, 38 Cal. App. 116, 132, 175 Pac. 791; *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401; *People v. Yee Foo*, 4 Cal. App. 730, 743, 89 Pac. 450; *People v. Wright*, 4 Cal. App. 704, 89 Pac. 364.

4. *People v. Nakis*, 184 Cal. 105,

193 Pac. 92. But see *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441, for a decision inclining the other way, although it may be distinguishable on the ground that the action of the trial court therein was such as by implication at least to hold that there was no misconduct.

5. *People v. Frigerio*, 107 Cal. 151, 40 Pac. 107.

6. *People v. McNabb*, 17 Cal. App. 154, 118 Pac. 945.

7. *People v. Niino*, 183 Cal. 126, 190 Pac. 626; *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Bishop*, 134 Cal. 682, 66 Pac. 976;

the rule is that the court should be given the opportunity to correct the irregularity or to prevent any prejudicial effect, if that be possible.⁸ The party must act promptly in assigning misconduct.⁹ And it has been held that an exception to the ruling upon the admissibility of evidence is insufficient as an exception to remarks of the court in connection with the ruling.¹⁰

Exception and Motion for New Trial.

§ 523. **Necessity for Exception in General.**—Section 1259 of the Penal Code, as amended in 1909, provides as follows:

“Upon an appeal taken by the defendant in open court, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.”

Prior to this amendment, it was necessary to preserve an exception to the following matters: rulings refusing to postpone the trial,¹¹ rulings either sustaining or overruling

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| <p>People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People v. Murphy, 35 Cal. App. Dec. 618, 200 Pac. 484; People v. Marsiglia, 35 Cal. App. Dec. 61, 198 Pac. 1007; People v. Riccardi, 33 Cal. App. Dec. 819, 195 Pac. 448; People v. Bernal, 40 Cal. App. 358, 180 Pac. 825; People v. Gasser, 34 Cal. App. 541, 168 Pac. 157; People v. Wing, 23 Cal. App. 53, 137 Pac. 48; People v. Lawlor, 21 Cal. App. 63, 131 Pac.</p> | <p>63; People v. Ferrara, 18 Cal. App. 271, 122 Pac. 1089; People v. Osborn, 12 Cal. App. 148, 106 Pac. 891.
 8. People v. MacDonald, 167 Cal. 545, 140 Pac. 256.
 9. People v. Marsiglia, 35 Cal. App. Dec. 61, 198 Pac. 1007.
 10. People v. Osborn, 12 Cal. App. 148, 106 Pac. 891.
 11. People v. Brown, 59 Cal. 345, 352.</p> |
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objections to evidence,¹² rulings upon objection to misconduct of counsel,¹³ or of the court,¹⁴ a refusal to submit written forms of verdicts,¹⁵ an order permitting an amendment to a verdict,¹⁶ and an order denying a new trial.¹⁷ But an order made upon ex parte application and an order or decision made in the absence of a party were deemed to have been excepted to.¹⁸

§ 524. Rulings on Requests for Instructions and Challenges.—Section 1176 of the Penal Code provides, in part, that

“When written instructions have been presented, and given, modified, or refused, or when the charge of the court has been taken down by the reporter, the questions presented in such instructions or charge need not be excepted to or embodied in a bill of exceptions.”

A substantially similar provision was in the Criminal Practice Act.¹⁹ The prisoner need not except to the action of the court in giving oral instructions in violation of the statute.²⁰

12. *People v. Scalemiero*, 143 Cal. 343, 76 Pac. 1098; *People v. Miller*, 122 Cal. 84, 54 Pac. 523; *People v. Morino*, 85 Cal. 515, 24 Pac. 892; *People v. Henderson*, 28 Cal. 466; *People v. Gutierrez*, 1 Cal. Unrep. 148; *People v. McKeehan*, 11 Cal. App. 443, 105 Pac. 273.

13. *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *People v. Melandrez*, 4 Cal. App. 396, 88 Pac. 372.

14. *People v. Bishop*, 134 Cal. 682, 66 Pac. 976; *People v. Abbott*, 101 Cal. 645, 36 Pac. 129; *People v. Galvin*, 9 Cal. 115.

15. *People v. Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652.

16. *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502.

17. *People v. Thompson*, 115 Cal.

160, 46 Pac. 912. See *People v. Mitchell*, 5 Cal. App. 45, 89 Pac. 853 (quære).

18. *People v. O'Brien*, 4 Cal. App. 723, 89 Pac. 438.

19. *People v. Gibson*, 106 Cal. 458, 573, 39 Pac. 864. See *People v. Northey*, 77 Cal. 618, 632, 19 Pac. 865, 20 Pac. 129 (where the court says an exception to a refusal of a request should be taken); See, also, *People v. Thompson*, 1 Cal. Unrep. 416 (where the court says it cannot find that exceptions to the giving of instructions were taken); and *People v. Gutierrez*, 1 Cal. Unrep. 148 (holding that an exception to a refusal to modify an instruction was necessary).

20. *People v. Ah Fong*, 12 Cal. 345. But see *People v. Ward*, 2 Cal. Unrep. 295.

Rulings upon challenges to jurors.—Formerly, the Penal Code and the Criminal Practice Act authorized an exception to the action of the court in disallowing a challenge to a juror for implied bias, and in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias,¹ but not to its action in allowing a challenge for implied bias,² or in disallowing a challenge for actual bias. Although the statute in respect to the latter ruling was followed in some cases,³ it was finally held that a defendant had a constitutional right to except to an order disallowing a challenge for actual bias interposed by him.⁴

§ 525. Necessity for Motion for New Trial.—Although there was no express statutory authority therefor, it was held in an early case that upon an appeal from a judgment, a defendant, without having made a motion for new trial, might rely on any of the grounds of exception mentioned in former section 1170 of the Penal Code, if included in a bill of exceptions; that is to say, errors in disallowing a challenge to the panel of the jury or to an individual juror for implied bias, errors in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias, and errors in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the

1. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115 (per Garoutte, J., concurring); *People v. Boling*, 83 Cal. 380, 23 Pac. 421; *People v. Taing*, 53 Cal. 602; *People v. Vasquez*, 49 Cal. 560; *People v. Cotta*, 49 Cal. 166.

2. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Atherton*, 51 Cal. 495; *People v. Murphy*, 45 Cal. 137; *People v. Arceo*, 32 Cal. 40. See *infra*, § 594.

3. *People v. Boling*, 83 Cal. 380,

23 Pac. 421; *People v. Ward*, 77 Cal. 113, 19 Pac. 373; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *People v. Riley*, 65 Cal. 107, 3 Pac. 413; *People v. Taing*, 53 Cal. 602; *People v. Brown*, 2 Cal. Unrep. 701, 13 Pac. 222.

4. *People v. Evans*, 124 Cal. 206, 56 Pac. 1024; *People v. Wells*, 100 Cal. 227, 34 Pac. 718; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115 (per Garoutte, J., specially concurring).

trial of the issue.⁵ This conclusion has been reaffirmed in later cases,⁶ and in a recent case it was held that there is no just ground for holding that this rule is not applicable under the present method of taking appeals and preparing the records thereon.⁷ By a comparison of section 1170 with 1181 of the Penal Code, it will be seen then that there are certain matters which may be presented to the attention of the court upon a motion for new trial alone, and other matters which may be brought to the attention of the appellate court either upon an appeal from an order denying a new trial or upon direct appeal from the judgment without the intervention of a motion for a new trial.⁸

§ 526. Where Review of Sufficiency of Evidence is Sought.—There is some conflict in the decisions as to the right to review the question of the sufficiency of the evidence to sustain the verdict upon an appeal from the judgment without the intervention of a motion for a new trial. Although it is permissible on such an appeal to review the question whether an instruction is erroneous because inapplicable to any evidence whatsoever in the case,⁹ it has been held that the court cannot pass upon the sufficiency of the evidence to authorize the instruction. If this were not the rule, the court said, an instruction as to the doctrine of reasonable doubt would allow the defendant to have the evidence examined on his appeal from the judgment in order to show that there was grave doubt of his guilt. Hence, it has been held that the court cannot look to the testimony brought up by a bill of exceptions on an

5. *People v. Keyser*, 53 Cal. 183.

6. *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Walker*, 142 Cal. 90, 75 Pac. 658; *Walker v. Superior Court*, 135 Cal. 369, 67 Pac. 336; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387; *People v. Durand*, 1 Cal. App. 71, 81 Pac. 672.

7. *People v. Clayton*, 33 Cal. App. 357, 363, 165 Pac. 37.

8. *Walker v. Superior Court*, 135 Cal. 369, 67 Pac. 336.

9. *Walker v. Superior Court*, 135 Cal. 369, 67 Pac. 336.

appeal from the judgment alone, unless authorized to do so on a motion for new trial, except in cases arising under section 1170 and in cases to which section 1259 is applicable.¹⁰ Upon the other hand, in a recent case the district court of appeal points out that there is no provision in the Penal Code restricting the nature of the points which may be reviewed on appeal from a judgment. And so that court holds that upon an appeal from a judgment in a criminal action, the insufficiency of the evidence to support the verdict is reviewable, as well as upon an appeal from an order denying a new trial. "Quite consistently, . . . and, indeed, most naturally," remarks Justice Hart, "the question whether the verdict is insufficiently supported would arise on an appeal from the judgment, to nullify which or the verdict itself is always the very object of an attack thereon, even where such attack is collaterally made, as on a motion for a new trial."¹¹

IV. TRANSFER OF CAUSE AND EFFECT THEREOF.

§ 527. In General.—When the legislature has prescribed the procedure for the taking of appeals, that method must

10. *People v. Durand*, 1 Cal. App. 71, 81 Pac. 672. See *People v. Cook*, 148 Cal. 334, 83 Pac. 43 (where the court says that the appeal from the judgment presented every point that could be raised on the appeal from the order denying a new trial, except that of the sufficiency of the evidence to sustain the verdict); *People v. Ward*, 145 Cal. 736, 79 Pac. 448 (on an appeal from a judgment and an order denying a new trial, but where the record did not show that the motion for a new trial was based on the ground of the insufficiency of the evidence, the court

said it was not prepared to say that the defendant seeking a review of an order denying a new trial on this ground could be excused from showing by the record that he based his motion on that ground); *People v. Taylor*, 59 Cal. 640, 651 (holding, upon an appeal from a judgment and an order denying a new trial, that the sufficiency of the evidence to sustain the verdict cannot be reviewed if the bill of exceptions does not show that a new trial was sought on this ground).

11. *People v. Clayton*, 33 Cal. App. 357, 362, 165 Pac. 37.

be pursued by the parties and accepted by the court.¹² This is the effect of section 1235 of the Penal Code, which is as follows:

“Either party in a prosecution by indictment or information may appeal to the supreme court [or to a district court of appeal] on questions of law alone, as prescribed in this chapter.”¹³

When a certain jurisdiction has been conferred upon an appellate court, and the legislature has not provided a mode for its exercise, it is competent for the court, if its attention is called to it in advance, to make a rule providing for it, and if not, when a case is presented, to adopt for it an appropriate mode, in itself reasonable, which is to be followed in like cases until altered by statute or rule. It may issue a writ of error or mandamus or certiorari, or frame and issue any other appropriate writ,¹⁴ or establish any appropriate procedure for bringing up a record or proceeding in the court below. And further it possesses incidental power of recognizing as proper any mode of procedure already adopted for bringing a cause before it.¹⁵

Allowing examination of records.—It has been held that a single justice of the appellate court has no authority to allow a defendant confined in the county jail permission to examine the records in his case in order to enable him to prepare his appeal.¹⁶

12. *People v. Jordan*, 65 Cal. 644, 646, 4 Pac. 683 (conceding this to be the rule).

13. Pen. Code, § 1235.

14. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *Ex parte Thistleton*, 52 Cal. 220 (holding that the county court, then existing, might issue a writ of error to a city criminal

court where no mode of appeal was provided by statute).

15. *People v. Jordan*, 65 Cal. 644, 4 Pac. 683; *People v. Kalloch*, 60 Cal. 113; *People v. Robinson*, 17 Cal. App. 273, 119 Pac. 527. See *APPEAL AND ERROR*, vol. 2, p. 112, for the rule in civil appeals.

16. *People v. Collins*, 7 Cal. Unrep. 273, 86 Pac. 895.

§ 528. Mode of Taking Appeal.—Prior to 1909, the method of taking appeals in criminal cases was prescribed in section 1240 of the Penal Code, which provided in substance that an appeal was taken by filing with the clerk of the court in which the judgment or order appealed from was entered, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.¹⁷

Appeals at the present time are governed by section 1239 of the same code, adopted in 1909 and amended in 1917, and also by section 1240. These sections are as follows:

“An appeal from a judgment may be taken by the defendant by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from the same or by filing a written notice of appeal within two days after the rendition of judgment with the clerk of the court wherein judgment was rendered; and from any order made after judgment, by announcing in open court at the time the same is made that he appeals from the same.”¹⁸

“An appeal may be taken by the people by announcing in open court at the time the same is made that the people appeal from the same.”¹⁹

A written notice of appeal may be signed by any attorney authorized by the defendant even though he may not have acted for him in the trial court. Section 285 of the Code of Civil Procedure, providing for a notice of change

17. *People v. Bell*, 70 Cal. 33, 11 Pac. 327; *People v. Jordan*, 65 Cal. 644, 4 Pac. 683 (holding that inasmuch as the order sustaining a demurrer entered in the minutes is a judgment, the mere fact that the notice of appeal calls the judgment an “order” does not render it ineffectual); *People v. Grigsby*, 62 Cal. 482 (acknowledgment of service); *People v. Ah Yute*, 56 Cal.

119; *People v. Stacey*, 34 Cal. 307 (holding service sufficient); *People v. Wallace*, 23 Cal. 93; *People v. Finerty*, 8 Cal. App. 466, 97 Pac. 73 (service of notice); *People v. Schmitz*, 7 Cal. App. 330, 342, 94 Pac. 407, 419; *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295.

18. Pen. Code, § 1239.

19. Pen. Code, § 1240.

of attorneys, has no application to appeals in criminal cases.²⁰

Time for appeal.—The written notice of appeal must be filed within two days “after the rendition of judgment.” The Penal Code prior to 1909 and the Criminal Practice Act prior to the code contained similar provisions save as to the length of time within which the appeal might be taken, and the cases arising under them are authority under the present provision. The time for appeal commences to run from and may be taken upon the rendition of the judgment. It would be premature if taken before the rendition of judgment,¹ but it might be taken after the rendition of judgment and before entry thereof.² The limitation as to time is mandatory and a compliance therewith is jurisdictional.³

§ 529. Appeal from Order Denying New Trial.—The right of appeal from an order denying a new trial is expressly given to the defendant by section 1237 of the Penal Code.⁴ Prior to 1909, an appeal from such an order was taken under section 1240 of the same code. But section 1240 now applies only to appeals by the people, and the code nowhere contains any provision prescribing the manner in which an appeal from such an order may be taken by the defendant. But since section 1259 of the Penal Code provides that upon an appeal in open court all matters in the record may be reviewed if properly presented,⁵ it has been held that if at the time of pronouncement of the judgment defendant’s counsel gives notice of

20. *Ex parte Clarke*, 62 Cal. 490.

1. *People v. Ward*, 138 Cal. 684, 72 Pac. 343.

2. *Ward v. Dunne*, 136 Cal. 19, 68 Pac. 105; *People v. Schmitz*, 7 Cal. App. 342, 94 Pac. 407, 419 (citing *Gray v. Palmer*, 28 Cal. 416 and *Peck v. Curtis*, 31 Cal. 207).

3. *People v. Ward*, 138 Cal. 684, 72 Pac. 343; *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295.

4. See *supra*, § 508.

5. See *supra*, § 527.

appeal, all the matters in the record may be reviewed.⁶ While the statute prescribes no form of notice of appeal, the defendant should not be deprived of his right of appeal because the notice includes orders from which no appeal lies, if it should be held that the order is not appealable.⁷ But it does not follow that a defendant cannot appeal from an order denying a new trial without also appealing from the judgment.⁸ The imposition of sentence may be suspended. To hold that the defendant cannot appeal from an order denying a new trial until rendition of judgment would be in effect to deprive him of any remedy during such suspension, even though he may not be guilty of the offense charged, or may have been illegally convicted. In such case the appeal should be perfected in the same manner as an appeal from the judgment or any order after judgment, without regard to the fact that no mention of the order is made in section 1239.⁹ Moreover, as has already been stated, the appellate court may recognize and adopt any appropriate and approved mode of procedure employed by an aggrieved party.¹⁰

§ 530. Entry of Notice of Appeal—Effect of Appeal.—
The code provides that

“Any announcement of appeal made in open court by either the defendant or the people, must be by the clerk immediately entered in the minutes of the court. But the failure of the clerk to so enter the same in the minutes shall in no way affect or invalidate the appeal.”^{10a}

6. *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586.

7. *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441.

8. *People v. Robinson*; 17 Cal. App. 273, 119 Pac. 527.

9. *Smith v. McCallum*, 36 Cal. App. 143, 172 Pac. 408 (quoting *State v. Coolidge*, 72 Wash. 42, 129 Pac. 1088, and holding also that

the fact that the defendant gives a bond conditioned for the performance of the judgment is not a waiver of the right to appeal from an order denying a new trial); *People v. Hartman*, 23 Cal. App. 72, 137 Pac. 611.

10. *People v. Robinson*, 17 Cal. App. 273, 119 Pac. 527.

10a. Pen Code, § 1241.

If the clerk fails to make the proper entry of the taking of the appeal, the defendant should, upon due notice, apply to the trial court for an order requiring the clerk to correct his minutes in accordance with the fact.¹¹

Effect of appeal.—An appeal from a judgment or order removes the subject matter thereof from the jurisdiction of the superior court.¹² Hence, pending such appeal, the superior court has no authority to vacate the judgment or order or make any order affecting it.¹³ While it is doubtful if the trial court in a criminal case can amend its minutes which constitute part of a judgment-roll, after an appeal has been taken and without notice,¹⁴ it has been held that when there is a mistake in an entry on the minutes of the court which is no part of the judgment pronounced, the mistake may be corrected at any time while the record is subject to the physical control of the court, so as to make the record speak the truth. And this power is not suspended by an appeal.¹⁵

V. RECORD.

§ 531. In General.—The proceedings in a trial court cannot be reviewed upon an appeal unless they have been authenticated in the mode pointed out by law and the rules of the courts of appeal.¹⁶ There must be some au-

11. *People v. Dresser*, 16 Cal. App. 583, 117 Pac. 688.

12. *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *People v. Dick*, 39 Cal. 102; *People v. Napoli*, 7 Cal. App. 79, 93 Pac. 500.

13. *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *People v. Cruse*, 24 Cal. App. 496, 141 Pac. 936.

14. *People v. Moore*, 103 Cal. 508, 37 Pac. 510.

15. *People v. McNulty*, 93 Cal. 427, 444, 26 Pac. 597, 29 Pac. 61; *People v. Murback*, 64 Cal. 369, 30 Pac. 608.

16. *People v. Terrill*, 131 Cal. 113, 63 Pac. 141; *People v. Long*, 121 Cal. 494, 53 Pac. 1097; *People v. Armstrong*, 44 Cal. 326; *People v. Dennis*, 39 Cal. 625, 634 (record should conform to rules of court); *People v. Trim*, 37 Cal. 274; *People v. Ferguson*, 34 Cal. 309; *People v. Martin*, 32 Cal. 91; *People v.*

thentic showing what the action of the trial court was and what it was based upon,¹⁷ otherwise an appellate court can do nothing but affirm the judgment.¹⁸

Prior to the adoption of the present method of preparing the record on appeal, the record consisted of a copy of the notice of appeal, the record of the action—that is to say, the judgment-roll—any bill of exceptions and the instructions and the indorsements thereon.¹⁹ An appeal from the judgment alone without a bill of exceptions brought up the judgment-roll and presented for review the sufficiency of the information, any errors disclosed in the minutes and the propriety of instructions given and refused.²⁰ If the errors complained of did not appear on the judgment-roll, it was necessary that the appeal be supported by a bill of exceptions,¹ signed² and settled by the trial judge.³ A bill of exceptions was necessary; for example, to enable the appellate court to review errors occurring at the trial,⁴ exceptions required by former sec-

Brecker, 20 Cal. App. 205, 221, 127 Pac. 666; *People v. Schultz*, 14 Cal. App. 106, 111 Pac. 271; *People v. Cusick*, 11 Cal. App. 188, 104 Pac. 461.

17. *People v. Martin*, 32 Cal. 91.

18. *People v. Terrill*, 131 Cal. 112; 63 Pac. 141; *People v. White*, 28 Cal. App. 736, 153 Pac. 964; *People v. Knoblock*, 11 Cal. App. 333, 104 Pac. 1012.

19. *People v. Glass*, 158 Cal. 650, 668, 112 Pac. 281 (holding that a demurrer is part of the judgment-roll); *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362 (the return of a sheriff upon a venire is not a part of the judgment-roll); *People v. Garnett*, 9 Cal. App. 194, 205, 98 Pac. 247 (the minutes of the trial are a part of the record).

20. *People v. Clark*, 121 Cal. 633, 54 Pac. 147; *People v. Trim*, 37 Cal.

274; *People v. McPherson*, 6 Cal. App. 266, 91 Pac. 1098.

1. *People v. Terrill*, 131 Cal. 113, 63 Pac. 141 (citing *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639); *People v. Davis*, 1 Cal. Unrep. 45. See *People v. Lee*, 14 Cal. 510, holding that a bill of exceptions and a statement are the same thing.

2. *People v. Armstrong*, 44 Cal. 326.

3. *People v. Pratt*, 78 Cal. 345, 20 Pac. 731 (proof in appellate court); *People v. Ferguson*, 32 Cal. 309.

4. *People v. Buck*, 151 Cal. 667, 91 Pac. 529 (order denying motion for postponement of the trial); *People v. Buck*, 151 Cal. 667, 91 Pac. 529 (an order denying a continuance); *People v. Weaver*, 47 Cal. 106 (exception to ruling denying continuance); *People v. Ashnauer*,

tions 1170 and 1172 of the Penal Code,⁵ an order refusing to dismiss the information,⁶ an order sustaining a demurrer,⁷ the sufficiency of the evidence to justify the verdict,⁸ and an order denying a motion for a new trial.⁹

In 1909, the legislature introduced radical changes into the method of preparing the record on appeal. The sections of the code relating to exceptions to certain matters and to bills of exceptions, and the manner of their preparation and settlement were in that year repealed, and a new method of preparing the record was substituted in lieu of the former system. It was evidently the design of the legislature to have the record provided in section 1246 of the Penal Code as amended and in the new section 1247 cover wholly the matter of record on appeal and dispense entirely with bills of exceptions.¹⁰

Subdivision 6 of Rule II of the supreme court provides in part:

“In criminal cases appealed under the provisions of sections 1246, 1247, 1247a, and 1247b of the Penal Code, the record upon appeal shall be prepared and transmitted to the court to which the appeal is taken, in accordance with said sections; and no further copies of such record shall be required.”

§ 532. Clerk's Transcript.—The Penal Code, as amended in 1909, provides as follows:

“Upon the appeal being taken, the clerk of the court from which the appeal is taken must, without charge,

47 Cal. 98 (exception to refusal of continuance); *People v. Ferguson*, 34 Cal. 309.

5. *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032.

6. *People v. Russo*, 8 Cal. App. 636, 97 Pac. 700.

7. *People v. Long*, 121 Cal. 494, 53 Pac. 1097; *People v. Knoblock*, 11 Cal. App. 333, 104 Pac. 1012; *People v. Cusick*, 11 Cal. App. 188, 104 Pac. 461; *People v. McPherson*,

3 Cal. App. xiii, 36 Pac. 907; *People v. Druffel*, 3 Cal. App. 731, 86 Pac. 907.

8. *People v. Padillia*, 42 Cal. 535; *People v. Tetherow*, 40 Cal. 286.

9. *People v. Crowley*, 100 Cal. 478, 483, 35 Pac. 84. See *infra*, § 538.

10. *People v. Fleming*, 166 Cal. 357, 375, Ann. Cas. 1915B, 881, 136 Pac. 291.

within twenty days thereafter transmit to the clerk of the appellate court a typewritten copy of the following papers: 1. The indictment, information or accusation; 2. A copy of the minutes of the plea; 3. A copy of the minutes of the demurrer; 4. A copy of the demurrer; 5. A copy of the minutes of the trial; 6. A copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial; 7. A copy of the written charges given by the court to the jury, or refused, or modified and given; also a transcript of any oral charge; 8. A copy of the judgment; 9. Any written or printed exhibits offered in evidence at the trial of the cause."¹¹

This section provides for a transmission to the appellate court of the papers and proceedings, which, properly speaking, constitute the judgment-roll in a criminal case, but now constitute the clerk's record and are so designated. These papers must be so transmitted whether the appeal is from the judgment or from an order denying a new trial or both.¹² This transcript does not include the certificate of a magistrate and proceedings remanding a defendant to the juvenile court and by the juvenile court back to the magistrate for further proceedings. And a defendant complaining of irregularities therein should make his objection a part of the record by bill of exceptions or by some special order of court.¹³ No authentication by the judge is required as to matters to be certified by the clerk under this code provision.¹⁴

§ 533. Reporter's Transcript—Application for.—Where an appeal is taken in any criminal action or proceeding where such appeal is allowed by law, it is provided by

11. Pen. Code, § 1246 (in part). The remaining portion of this code section relates to the right of the defendant or his attorney and the district attorney to receive from the clerk of the trial court, without charge, carbon copies of the record so transmitted.

12. *People v. Clayton*, 33 Cal. App. 357, 362, 165 Pac. 37.

13. *People v. Wolff*, 182 Cal. 728, 190 Pac. 22.

14. *People v. Fleming*, 166 Cal. 357, 375, Ann. Cas. 1915B, 881, 136 Pac. 291.

the code that the defendant, or the district attorney when the people appeal, must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed, and the judgment or order may be enforced as if no appeal had been taken.¹⁵ The requirement that an application be filed is mandatory.¹⁶ It is not necessary that the notice be in any particular form.¹⁷ Although the terms "grounds" and "points" are conjunctively stated in the code section, there is in contemplation of the statute no substantial distinction between them. It is sufficient, therefore, if the application state the grounds of the appeal without also specifying the points relied on.¹⁸ A statement that the appellant "thinks" or is of the "opinion" that all the testimony is necessary has been held to be sufficient "designation" of the portions of the reporter's transcript to be transcribed.¹⁹ If a sufficient application is filed, the appellate court may consider additional points not included therein and referable solely to the judgment-roll, such as the insufficiency of the indictment or information and the judgment.²⁰

§ 534. Preparation and Requisites of Reporter's Transcript.—Following the application of an appellant for a

15. See Pen. Code, § 1247, as amended in 1911.

16. *People v. Ali*, 38 Cal. App. 544, 176 Pac. 883; *People v. Measor*, 20 Cal. App. 406, 129 Pac. 469; *Rhodes v. Sargent*, 17 Cal. App. 54, 118 Pac. 727.

17. *People v. Clayton*, 33 Cal. App. 357, 363, 165 Pac. 37.

18. *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090.

19. *People v. Clayton*, 33 Cal. App. 357, 363, 165 Pac. 37.

20. *People v. Votaw*, 38 Cal. App. 714, 177 Pac. 485.

transcript of the reporter's notes,¹ the court shall, within two days thereafter make an order directing the phonographic reporter "to transcribe such portion of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by the appellant."² If the court fails to make such order within the time specified, the notes requested in the application shall be transcribed without it,³ for in such case, the failure of the court is to be taken as assent to the application as made.⁴

"The phonographic reporter shall, within twenty days after the filing of such application, file with the clerk of the court an original transcription and three carbon copies of the portion of the notes so required to be transcribed, excluding therefrom all argument of counsel not objected to at the time it was made. The same shall be typewritten as prescribed by the rules of the supreme court."⁵

"No printing of any record on appeal or briefs in a criminal case shall be required or ordered."⁶

The statute making a typewritten transcript of the evidence the record on appeal does not, however, change the rule of the supreme court requiring transcripts in all cases to conform to certain dimensions.⁷

In almost all cases of appeals by a defendant, the record on appeal should contain all the material and important testimony received at the trial. This is as necessary upon an appeal from the judgment alone as upon appeals in other cases, for two reasons. In the first place, the questions as to the sufficiency of the evidence to justify the verdict is reviewable upon an appeal from the judgment. In the next place, under section 4½ of article VI of the constitution, before reversing a case because of errors in matters of pleading or procedure, the appellate court

1. See *supra*, § 533.

2. See Pen. Code, § 1247.

3. See Pen. Code, § 1247.

4. *People v. Gavin*, 33 Cal. App. Dec. 157, 193 Pac. 174.

5. Pen. Code, § 1247 (in part).

See *infra*, § 536.

6. Pen. Code, § 1247e.

7. *People v. Phillips*, 12 Cal. App. 760, 765, 108 Pac. 731.

must, after an examination of the entire cause, "including the evidence," be of the opinion that the error resulted in a miscarriage of justice.⁸

Authentication.—The statute requires the reporter to certify to the correctness of his transcript under oath. A naked statement in the form of a certificate that the transcript is correct is not sufficient.⁹ Since the authentication of the record on appeal of the proceedings of the trial court constitutes the evidence from which the reviewing court may determine whether the proceedings were had in the court below, there should be a strict compliance with the provisions of the statute relating thereto.¹⁰

§ 535. Duty of Clerk—Correction and Transmission of Transcript.—The statute provides that

"Upon the transcribed notes being filed by the reporter with the clerk, it shall be the duty of the clerk forthwith, to immediately deliver upon demand one of the carbon copies to the defendant or his attorney, the other carbon copy upon demand to the district attorney, and deliver the original, with the date of the several deliveries of the original and the copies, if delivery has been made, indorsed upon the original, to the court for its approval. Unless objection is made thereto by either the defendant or his attorney or the district attorney, within ten days after the receipt thereof, the judge shall certify thereon that no objection has been made thereto within the time allowed by law; and after so certifying shall immediately redeliver the same to the clerk. The defendant or his attorney or the district attorney may file with the clerk a proposed correction of the transcribed proceedings within ten days after the filing of the transcribed proceedings. The court must immediately hear and determine the objection; if in the opinion of the court the transcription of the proceedings is not correct, the court must correct the same. When

8. *People v. Clayton*, 33 Cal. App. 127 Pac. 666; *People v. Schultz*, 14 Cal. App. 106, 111 Pac. 271.

9. See Pen. Code, § 1247; *People v. Brecker*, 20 Cal. App. 205, 221, 127 Pac. 666.

so corrected he must certify thereon that all objections made thereto have been heard and determined, and the same corrected in accordance with such determination; and thereupon immediately redeliver the same to the clerk. When the original transcription of the proceedings so certified by the judge has been received by the clerk from the judge, he must immediately transmit the same to the court to which the appeal was taken, and thereupon it shall become a part of the record upon appeal and he must immediately transmit to the attorney general a carbon copy thereof with any and all corrections made to the original notes thereon."¹¹

The trial judge should strictly comply with the statute in certifying the transcript.¹²

§ 536. Transcript by Appellant.—By an amendment of the Penal Code in 1909 it is provided as follows:

"If a transcription of the phonographic reporter's notes cannot be obtained, by reason of his illness or death, the appellant shall cause to be prepared and filed, in place thereof, a transcription of such of the proceedings as was by the court ordered to be transcribed by the phonographic reporter. Such transcription must be filed within the time and in the manner provided for the filing of the phonographic reporter's transcribed notes. Upon such filing by the appellant, the same proceedings shall be had and taken as is provided in section twelve hundred and forty-seven a of this code, upon the filing of the phonographic reporter's transcribed notes."¹³

Extension of time.—"The time within which the phonographic reporter shall transcribe and file his notes or the appellant shall file a transcription of the proceedings, as provided in section twelve hundred and forty-seven b of this code cannot be extended by the judge of the court or by the court in which the cause was tried. Upon affidavit

11. Pen. Code, § 1247a.

12. *People v. Brecker*, 20 Cal. App. 205, 221, 127 Pac. 666; *People v. Boero*, 13 Cal. App. 686, 110 Pac. 525.

13. Pen. Code, § 1247b. See *supra*, § 535, for the provisions of Pen. Code, § 1247a, referred to in the above.

showing good cause therefor, the court in which the appeal is pending may extend the time not exceeding sixty days."¹⁴

§ 537. Argument and Instructions.—To properly present upon appeal in a criminal case the question of misconduct of the prosecuting attorney in argument, the phonographic reporter's transcript of his notes showing the portion of the argument complained of, the objection made, and action of the trial court thereon, should be brought to the appellate court.¹⁵ The transcript of the proceedings should not, however, include arguments made by counsel to the court on questions of law arising during the trial.¹⁶ Neither should it include an argument not objected to at the time it was made.¹⁷

Authentication of instructions.—Besides providing that the questions presented in the instructions need not be excepted to or embodied in a bill of exceptions,¹⁸ and that "the judge must make and sign an indorsement upon such instructions showing the action of the court thereon,"¹⁹ and "certify to the correctness of the reporter's transcript of the charge," the code provides that "thereupon the same, with the indorsements, become a part of the record, and any error in the action of the court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions."²⁰ The Criminal Practice Act contained a similar provision.¹ An instruction not indorsed or certified as required by the code constitutes no part of the record on appeal and cannot be considered unless, under the former practice, it was contained in a settled

14. Pen. Code, § 1247d.

15. *People v. Fleming*, 166 Cal. 357, 377, Ann. Cas. 1915B, 881, 136 Pac. 291.

16. *People v. Miller*, 171 Cal. 649, 154 Pac. 468.

17. See Pen. Code, § 1247.

18. See *supra*, § 524.

19. See *supra*, § 368.

20. Pen. Code, § 1176; *People v. Sing Yow*, 145 Cal. 1, 10, 78 Pac. 235; *People v. Padilla*, 143 Cal. 158, 163, 76 Pac. 889; *People v. Vital*, 4 Cal. Unrep. 320, 34 Pac. 617; *People v. Smith*, 2 Cal. Unrep. 215.

1. Crim. Prac. Act, § 438.

bill of exceptions.² The clerk cannot give verity to instructions given or refused, which are not so indorsed or certified, by inserting them in the judgment-roll.³ This rule is not changed by section 1246 of the Penal Code, as amended in 1909, which directs the clerk to send to the appellate court a copy of the charges, as this section must be read in connection with section 1176 of that code.⁴

§ 538. Papers and Evidence on Motions.—Affidavits and motion papers form no part of the judgment-roll and prior to 1909 it was frequently held that they could not be considered upon appeal unless they were authenticated, as provided in rule XXIX of the supreme court, by incorporating them in a bill of exceptions, and unless it appeared that they were used on the motion.⁵ This rule was appli-

2. *Walker v. Superior Court*, 139 Cal. 108, 110, 72 Pac. 829 (per concurring opinion of Angellotti, J., and Shaw, J.); *People v. Cole*, 127 Cal. 545, 59 Pac. 984; *Cohen v. Wallace*, 107 Cal. 133, 40 Pac. 101 (holding that if the instructions are authenticated by the judge, they should not be repeated in the bill of exceptions); *People v. Clark*, 106 Cal. 32, 39 Pac. 53 (but holding that a refusal to certify the report of the oral charge was harmless where it was included in the bill of exceptions); *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *People v. Bemmerly*, 87 Cal. 117, 121, 25 Pac. 266; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Lundquist*, 84 Cal. 25, 24 Pac. 153; *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *People v. Rogers*, 81 Cal. 209, 22 Pac. 592; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. Von*, 78 Cal. 1, 20 Pac. 35; *People v. January*, 77 Cal. 179,

19 Pac. 258; *People v. Tetherow*, 40 Cal. 286; *People v. Trim*, 37 Cal. 274; *People v. Thompson*, 28 Cal. 214, 218; *People v. Vital*, 4 Cal. Unrep. 320, 34 Pac. 617; *People v. Romero*, 17 Cal. App. 680, 121 Pac. 698; *People v. Gee Gong*, 15 Cal. App. 29, 114 Pac. 78, 81; *People v. Schultz*, 14 Cal. App. 106, 111 Pac. 271.

3. *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *People v. January*, 77 Cal. 179, 19 Pac. 258; *People v. Flahave*, 58 Cal. 249 (per McKinstry, J., concurring).

4. *People v. Schultz*, 14 Cal. App. 106, 111 Pac. 271.

5. *People v. Buck*, 151 Cal. 667, 91 Pac. 529; *People v. Sing Yow*, 145 Cal. 1, 10, 78 Pac. 235; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Terrill*, 131 Cal. 112, 63 Pac. 141; *People v. McMahon*, 124 Cal. 435, 57 Pac. 224; *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453; *People v. Fredericks*, 106 Cal. 554,

cable to affidavits and minutes of the proceedings upon a motion for a new trial.⁶ As elsewhere stated, bills of exceptions were abolished in criminal cases in 1909. Consequently, this method of authenticating affidavits does not obtain under the present practice.⁷ The mere fact that a copy of an affidavit is filed in an appellate court will not authorize the court in considering it.⁸ So also the phonographic reporter's notes do not ordinarily include affidavits filed in the cause, and it is not necessary that they be presented as a part of his transcript, certified by the trial judge, although the appellate court might possibly consider them if so presented. In the case of affidavits used on a motion for a new trial, however, the practice is settled that they may be forwarded under subdivision 6 of section 1246 of the Penal Code, requiring the clerk to transmit to the appellate court a copy of the minutes of the proceedings on motion for a new trial. This section should be liberally construed with a view of enabling the defendant to bring up all matters cognizable by an appellate court. The clerk is required by subdivision 9 of section 1246 to transmit "any written or printed exhibits offered in evidence at the trial of the cause," and with equal reason, he should under subdivision 6 transmit a copy of affidavits used on the motion. Of course, the affidavits set forth should be so certified and identified as to

39 Pac. 944; *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73; *People v. Weaver*, 47 Cal. 106; *People v. Padillia*, 42 Cal. 535; *People v. Price*, 17 Cal. 310; *People v. Honshell*, 10 Cal. 83; *People v. Stonecipher*, 6 Cal. 405; *People v. Court-right*, 10 Cal. App. 522, 102 Pac. 542; *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912; *People v. Williams*, 8 Cal. App. 595, 97 Pac. 684; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506.

6. *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907; *People v. Welch*, 57 Cal. 138; *People v. Padillia*, 42 Cal. 535; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506; *People v. Frank*, 2 Cal. App. 283, 83 Pac. 578. See *People v. Ward*, 145 Cal. 736, 79 Pac. 448, not deciding whether the rule applies to an order denying a new trial.

7. See *supra*, § 514.

8. *People v. Hatch*, 13 Cal. App. 521, 527, 109 Pac. 1097.

make at least a *prima facie* case that they are the precise and only affidavits presented on the motion.⁹

§ 539. What Record must Show.—The record on appeal must contain the judgment or order from which the appeal is taken,¹⁰ and it must show that an appeal has been taken as prescribed by law, otherwise it does not appear that the appellate court has acquired jurisdiction to review the record.¹¹ The orderly and proper way to do this is by transmitting to the clerk of the appellate court the copy of the minutes of the clerk of the trial court under section 1246 of the Penal Code.¹² When the statute requires certain proceedings to be entered in the minutes of the court, the record on appeal should show that such proceedings were had.¹³ When it does not do so, the appellate court is not authorized in indulging the presumption that such proceedings were had, although not entered in the minutes.¹⁴ Since a defendant cannot in general urge upon appeal objections which he failed to urge in the trial court, the record should ordinarily show that objections were seasonably made, and, if an exception to the ruling of the court is necessary, it must also show that an exception was taken.¹⁵

9. *People v. Fleming*, 166 Cal. 357, 376, Ann. Cas. 1915B, 881, 136 Pac. 291.

10. *People v. Lenon*, 77 Cal. 308, 19 Pac. 521; *People v. Sing Lum*, 60 Cal. 6.

11. *People v. Brown*, 148 Cal. 743, 84 Pac. 204; *People v. Colon*, 119 Cal. 668, 51 Pac. 1082; *People v. Swearingner*, 4 Cal. Unrep. 964, 38 Pac. 972; *People v. Pico*, 1 Cal. Unrep. 711 (case stricken from files when the record contained no notice of appeal); *People v. Bell*, 70 Cal. 33, 11 Pac. 327; *People v. Clark*,

49 Cal. 455; *People v. Phillips*, 45 Cal. 44; *People v. Tate*, 17 Cal. App. 368, 119 Pac. 939; *People v. Dresser*, 16 Cal. App. 583, 117 Pac. 688; *People v. Finerty*, 8 Cal. App. 466, 97 Pac. 73.

12. *People v. Dresser*, 16 Cal. App. 583, 117 Pac. 688.

13. *People v. Gaines*, 52 Cal. 479.

14. See *infra*, § 568.

15. *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984; *People v. Miller*, 122 Cal. 84, 54 Pac. 523. See *supra*, § 514 et seq., as to necessity of objections and exceptions.

§ 540. **Further Transcript.**—Upon suggestion to the appellate court that a further transcription of the proceedings in the trial court is necessary, and if in the opinion of the court it is necessary to the consideration of the appeal, the appellate court may order the same to be transcribed by the phonographic reporter within a time fixed in the order; provided that no further transcription shall be ordered upon the suggestion of the appellant unless the application therefor was included in the original application made to the trial court. There shall thereupon be transcribed the portion so ordered, and copies filed with the clerk of the superior court in the same manner and with like force and effect as though included in the original order of the court; and like proceedings shall be had and taken as provided by law, as in case of the original.¹⁶

This section contemplates that the order shall be made by the appellate court and the additional transcription follow.¹⁷ An appellant may proceed under this section if the reporter improperly omits to transcribe portions of his notes designated in the application, and the trial court denies a motion to correct the record. The remedy by appeal from the order of the trial court as a special order after judgment is inadequate. It would be unreasonable that one should be required to remain in jail pending the determination of such collateral appeal.¹⁸ The application for a further transcript will be denied if it appears that the testimony not transcribed was not introduced at the trial.¹⁹

16. See Pen. Code, § 1247c.

17. *People v. Western Meat Co.*, 13 Cal. App. 539, 110 Pac. 338 (holding that an amendment of the transcript by the trial court without a previous order of the appellate court is irregular, but as no

prejudice can result therefrom, the amendment will be recognized).

18. *People v. Gavin*, 33 Cal. App. Dec. 157, 193 Pac. 174.

19. *People v. Evans*, 34 Cal. App. 284, 167 Pac. 190.

Proceedings taken by a trial court pending the appeal cannot be presented by a supplemental transcript of the official reporter.²⁰

§ 541. Amendment and Correction of Record—Conclusiveness.—An appellate court has no power to vary or amend the transcript itself, for in case it does so, it would not be reviewing the action of the trial court but would be passing upon a different case.¹ But rule XIV of the supreme court provides that

“For the purpose of correcting any error or defect in the transcript either party may suggest the same in writing, and upon notice and good cause shown obtain such order as may be proper.”²

Under this rule, if the clerk of the trial court should omit to make an entry of the taking of the appeal, the appellant, upon obtaining a correction of the minutes, may upon suggestion of diminution of the record, upon motion duly made, supply the reviewing court with a proper record of his appeal.³

Conclusiveness.—The record imports absolute verity,⁴ and it cannot be contradicted by statements in briefs of counsel,⁵ or by affidavits filed in the appellate court.⁶ A recital in a corrected judgment that the defendant was present when the correction was made is conclusive upon an appellate court when there is nothing to controvert the truth of the recital.⁷ In case of a conflict between the

20. *People v. Cruse*, 24 Cal. App. 496, 141 Pac. 936.

1. *People v. Johnson*, 9 Cal. App. 233, 98 Pac. 682.

2. *People v. Frank*, 2 Cal. App. 283, 83 Pac. 578. See *People v. Shehadey*, 12 Cal. App. 648, 108 Pac. 146 (where the court made an order under the former rule).

3. *People v. Dresser*, 16 Cal. App. 583, 117 Pac. 688.

4. *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73, 4 Pac. 773; *People v. Woods*, 43 Cal. 176; *People v. Collins*, 6 Cal. App. 492, 505, 92 Pac. 513.

5. *People v. Rodley*, 131 Cal. 240, 261, 63 Pac. 351.

6. *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73, 4 Pac. 773.

7. *People v. Rozelle*, 78 Cal. 84, 91, 20 Pac. 36.

clerk's transcript and the reporter's transcript, the former controls.⁸

Questions Presented for Review.

§ 542. **In General.**—In the consideration of an appeal, an appellate court must be guided solely by the authenticated record and cannot go beyond it;⁹ any errors warranting a reversal must affirmatively and clearly appear therein.¹⁰ The court cannot, in lieu of the record required by statute and rules of court, accept the statements of counsel in his argument or in his brief.¹¹ Nor can it consider affidavits of counsel¹² or other papers that have no place in the record and are not a part thereof.¹³

8. *People v. Riccardi*, 33 Cal. App. Dec. 819, 195 Pac. 448.

9. *People v. Mooney*, 176 Cal. 105, 167 Pac. 696; *People v. Anderson*, 26 Cal. 129, 134; *People v. Rader*, 24 Cal. App. 477, 481, 141 Pac. 958.

10. *People v. Harris*, 169 Cal. 53, 64, 145 Pac. 520; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. Kaiser*, 119 Cal. 456, 51 Pac. 702 (holding that the fact that an additional indictment was found based upon the same transaction cannot be considered if not disclosed by the record); *People v. Gillis*, 97 Cal. 542, 32 Pac. 586 (error in sustaining an objection by the prosecution where no objection to the question was made at the taking of the deposition); *People v. Von*, 78 Cal. 1, 20 Pac. 35; *People v. Williams*, 45 Cal. 25; *People v. Best*, 39 Cal. 690; *People v. White*, 34 Cal. 183; *People v. Richmond*, 29 Cal. 414; *People v. King*, 27 Cal. 514, 87 Am. Dec. 95; *People v. Bray*, 42 Cal. App. 465, 183 Pac. 712; *People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63 (the action of the court in limit-

ing the time for argument must be shown in the record). See *infra*, § 568 et seq.

11. *People v. Hower*, 151 Cal. 638, 646, 91 Pac. 507; *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. English*, 52 Cal. 211; *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442; *People v. Ernsting*, 14 Cal. App. 708, 112 Pac. 913; *People v. McPherson*, 6 Cal. App. 266, 91 Pac. 1098.

12. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650; *People v. McMahon*, 124 Cal. 435, 57 Pac. 224; *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Jordan*, 66 Cal. 10, 56 Am. Rep. 73, 4 Pac. 773.

13. *People v. Shortridge*, 179 Cal. 507, 177 Pac. 458 (a deposition taken at the preliminary examination not offered in evidence at the trial has no place in the record and cannot be considered on appeal); *People v. Herbert*, 61 Cal. 544 (reporter's notes, under the former practice); *People v. Brown*, 48 Cal. 253; *People v. Armstrong*, 44 Cal.

In accordance with these rules unless the record shows the error, the appellate court will not consider an objection that there is no evidence that any shorthand reporter was appointed to take the evidence at the preliminary examination,¹⁴ or review a ruling upon a motion to set aside an indictment or information;¹⁵ or an order upon a demurrer,¹⁶ or rulings upon a challenge to the panel of trial jurors,¹⁷ or an order refusing to appoint an interpreter for a witness, where it does not appear that the witness was unable to speak or understand the English language,¹⁸ or as to an alleged absence of the defendant from the trial.¹⁹ Following the same rule, when it is claimed that the district attorney cross-examined a witness upon matters not brought out on his direct examination, the testimony given by him must be set out.²⁰ And a refusal to allow the reading in argument of extracts

326 (transcript of reporter's notes); *People v. Woods*, 43 Cal. 176 (reporter's notes); *People v. Padillia*, 42 Cal. 535 (reporter's notes); *People v. Mellon*, 1 Cal. Unrep. 543; *People v. Davis*, 1 Cal. Unrep. 45; *People v. Garnett*, 9 Cal. App. 194, 202, 98 Pac. 247 (minutes of the clerk of the issuance of a commission).

The transcript of the preliminary examination if not offered in evidence until after the case is closed and judgment pronounced is not properly a part of the record on appeal and will not be considered. *People v. Bellon*, 180 Cal. 706, 182 Pac. 420.

The opinion of the trial court in granting or denying a new trial is not a part of the record, and cannot be regarded in determining whether a new trial should have been granted or denied. *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Reynolds*, 2 Cal. Unrep.

186; *People v. Mallicoat*, 27 Cal. App. 355, 359, 149 Pac. 1000; *People v. Petros*, 25 Cal. App. 236, 143 Pac. 246.

14. *People v. Ehanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049.

15. *People v. Rader*, 24 Cal. App. 477, 481, 141 Pac. 958. See *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586, holding that an objection will not be considered unless the papers used at the hearing of the motion are properly authenticated.

16. *People v. Clarke*, 2 Cal. Unrep. 110.

17. *People v. Goldenson*, 76 Cal. 323, 346, 19 Pac. 161.

18. *People v. Lopez*, 21 Cal. App. 188, 131 Pac. 104.

19. *People v. Holmes*, 118 Cal. 444, 449, 50 Pac. 675; *People v. Bealoba*, 17 Cal. 389.

20. *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263.

from newspapers or books will not be reviewed where the record fails to show what the extracts were or their relation to the case.¹ Likewise, misconduct of the district attorney in argument cannot be reviewed if the transcript does not disclose what he said,² and also that an objection was made to it at the time or that a request for an instruction to the jury to disregard the impropriety was ever made.³ So also misconduct of the judge must be made to appear in some mode provided in the code before it can be availed of upon appeal.⁴

§ 543. Evidence.—Alleged errors in the admission of evidence cannot be reviewed unless the record shows that an objection to its admission was made,⁵ and what the evidence improperly admitted was.⁶ It is insufficient merely to show the asking of a question, an objection, and the adverse ruling thereon, without showing what the answer was.⁷ Where the admissibility of evidence depends upon a consideration of the evidence itself, an alleged error in the admission thereof is not reviewable if such evidence or a portion of it is not in the record.⁸ And it

1. *People v. Godwin*, 123 Cal. 374, 55 Pac. 1059; *People v. Ecton*, 29 Cal. App. 478, 156 Pac. 996.

2. *People v. Philbon*, 138 Cal. 530, 71 Pac. 650; *People v. Greening*, 102 Cal. 384, 36 Pac. 665; *People v. Faulke*, 96 Cal. 17, 30 Pac. 837; *People v. Gordon*, 1 Cal. Unrep. 459 (where the record did not show the passages from medical works read by counsel); *People v. Lytle*, 34 Cal. App. 360, 167 Pac. 552; *People v. Valencia*, 27 Cal. App. 407, 150 Pac. 68; *People v. Peery*, 26 Cal. App. 143, 146 Pac. 44; *People v. Horvath*, 23 Cal. App. 306, 137 Pac. 1069.

3. *People v. Horvath*, 23 Cal. App. 306, 137 Pac. 1069.

4. *People v. De Graff*, 127 Cal. 676, 60 Pac. 429.

5. *People v. Morrell*, 28 Cal. App. 729, 153 Pac. 977.

6. *People v. Lowrie*, 4 Cal. App. 137, 87 Pac. 253. See cases cited *infra*.

7. *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091; *People v. Lee Chuck*, 78 Cal. 317, 322, 20 Pac. 719; *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503; *People v. Williams*, 45 Cal. 25; *People v. White*, 34 Cal. 183; *People v. Graham*, 21 Cal. 261.

8. *People v. Allen*, 144 Cal. 299, 77 Pac. 948; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Williams*, 45 Cal. 25; *People v. McGungill*, 41 Cal. 429.

has been held that the fact that the court instructed the jury to disregard the evidence complained of does not alter the matter, for, so far as the appellate court may know, in the absence of a showing in the record, the first ruling of the trial court may be correct and the instruction erroneous.⁹ Pursuant to the same rule, if it is claimed that the transcript of the testimony at the preliminary examination was erroneously admitted in evidence because not properly certified, the certificate must be incorporated in the record.¹⁰ And where it is claimed that a deposition was inadmissible, because the original notes were not filed, the record must show the fact.¹¹ Likewise, if a variance between the shorthand notes and the transcript is alleged, enough of the evidence to show the materiality of the variance should be embodied in the record.¹²

An order excluding offered evidence cannot be reviewed if the evidence offered or its substance is not in the record, for otherwise it will not appear that the substantial rights of the defendant have been injuriously affected.¹³ Upon the same principle, when an order refusing a subpoena duces tecum is assigned as error it should be shown by the record that the document desired contained evidence pertinent to the case.¹⁴

9. *People v. Allen*, 144 Cal. 299, 77 Pac. 948; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125.

10. *People v. Buckley*, 143 Cal. 375, 382, 77 Pac. 169; *People v. Bretoni*, 22 Cal. App. 426, 134 Pac. 790.

11. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

12. *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

13. *People v. Bidleman*, 104 Cal. 608, 615, 38 Pac. 502; *People v. Brotherton*, 47 Cal. 388, 404; *People v. Balmain*, 16 Cal. App. 28, 32, 116

Pac. 303; *People v. Ernsting*, 14 Cal. App. 708, 112 Pac. 913; *People v. Lowrie*, 4 Cal. App. 137, 87 Pac. 253.

14. *People v. Bray*, 42 Cal. App. 465, 183 Pac. 712 (holding the statement of counsel made to the court at the time of the offer will not supply the lack of the document itself). *People v. Burke*, 18 Cal. App. 72, 99, 122 Pac. 435 (holding that a refusal of a court to direct a district attorney to produce a paper cannot be held prejudicial error where the record does not disclose its contents).

Sufficiency of evidence.—To enable the appellate court to review the sufficiency of the evidence, the record must set forth all the evidence. If that court is not furnished with a copy of the testimony in the case it will be presumed that the evidence was amply sufficient to justify the verdict.¹⁵ Accordingly, the objection that the venue was not proved cannot be reviewed if the record does not contain all the evidence or otherwise show the venue was not proved.¹⁶

§ 544. *Instruction.*—Alleged errors in giving instructions cannot be reviewed unless the instructions given are properly incorporated in the record,¹⁷ and unless it also appears that the instructions complained of were not given at the request of the defendant.¹⁸ It is necessary also that the evidence be in the record unless the instructions objected to are erroneous under every conceivable state of facts.¹⁹ As stated in one case, in the absence of the

15. *People v. Coulter*, 145 Cal. 66, 78 Pac. 348 (where the bill of exceptions showed affirmatively that it did not contain all the evidence); *People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254; *People v. Dye*, 62 Cal. 523; *People v. Taylor*, 59 Cal. 640; *People v. Woods*, 43 Cal. 176; *People v. McAuslan*, 43 Cal. 55; *People v. Tetherow*, 40 Cal. 286; *People v. Malone*, 32 Cal. App. Dec. 729, 191 Pac. 1113; *People v. Schultz*, 14 Cal. App. 106, 111 Pac. 271; *People v. Ju Buck Ning*, 9 Cal. App. 735, 100 Pac. 887. See *People v. Griffith*, 122 Cal. 212, 54 Pac. 725, holding that when it is claimed that the verdict is not sustained by the evidence, it is incumbent upon the prosecution to see that the bill of exceptions contains all the evidence, or at least some evidence tending to prove every material fact.

16. *People v. Tomielli*, 81 Cal. 275, 22 Pac. 678; *People v. Carroll*, 80 Cal. 153, 22 Pac. 129; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254 (presumption as to proof of venue).

17. *People v. Fice*, 97 Cal. 459, 32 Pac. 531; *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503; *People v. Ward*, 2 Cal. Unrep. 205; *People v. Godkins*, 1 Cal. Unrep. 61; *People v. Schultz*, 14 Cal. App. 106, 111 Pac. 271.

18. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. Casselman*, 10 Cal. App. 234, 239, 101 Pac. 693.

19. *People v. Wong Fook Sam*, 146 Cal. 114, 79 Pac. 848; *People v. Allen*, 144 Cal. 298, 77 Pac. 948; *People v. Mendenhall*, 135 Cal. 344, 347, 67 Pac. 325; *People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *People v. Vereseneckockockhoff*, 129 Cal.

evidence, the action of the trial court must be viewed in the light of any conceivable evidence against the defendant.²⁰ When it is claimed that a fact is assumed in an instruction, the record should show that there was a conflict of evidence as to the fact assumed.¹

Refusal of instructions.—Alleged errors in the refusal of instructions will not be reviewed unless the instructions requested are inserted in the record,² and unless it appears that they were requested by the defendant.³ It is necessary that the evidence be in the record except when the request is erroneous in every conceivable state of facts, for it will not be presumed against the action of the court that there was evidence which warranted the instruction.⁴

497, 507, 58 Pac. 156, 62 Pac. 111; People v. McCarthy, 115 Cal. 255, 261, 46 Pac. 1073; People v. Don-guli, 92 Cal. 607, 28 Pac. 782; People v. Olsen, 80 Cal. 122, 22 Pac. 125; People v. McNabb, 79 Cal. 419, 21 Pac. 843; People v. Williams, 75 Cal. 306, 17 Pac. 211; People v. Smith, 57 Cal. 130; People v. Johnson, 47 Cal. 122; People v. Strong, 46 Cal. 302; People v. Donahue, 45 Cal. 321; People v. Padillia, 42 Cal. 535; People v. Long, 39 Cal. 694; People v. Torres, 38 Cal. 141; People v. Dick, 34 Cal. 663; People v. Dick, 32 Cal. 213; People v. King, 27 Cal. 507, 514, 87 Am. Dec. 95; People v. Bonney, 19 Cal. 426, 446; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; People v. Baker, 1 Cal. 403; People v. McCauley, 1 Cal. 379, 385; People v. Johnson, 2 Cal. Unrep. 573, 8 Pac. 690; People v. Jenkins, 1 Cal. Unrep. 77; People v. Godkins, 1 Cal. Unrep. 61; People v. Williams, 27 Cal. App. 296, 149 Pac. 768; People v. Silva, 8 Cal. App. 349, 97 Pac. 202.

20. People v. Simmons, 7 Cal. App. 559, 95 Pac. 48.

1. People v. Le Sare Bo, 72 Cal. 623, 14 Pac. 310.

2. People v. Mueller, 168 Cal. 526, 143 Pac. 750.

3. People v. Cebulla, 137 Cal. 314, 70 Pac. 181; People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Collins, 35 Cal. App. 175, 169 Pac. 410; People v. Vukojevich, 25 Cal. App. 459, 143 Pac. 1058; People v. James, 5 Cal. App. 427, 90 Pac. 561; People v. Fitzgerald, 1 Cal. App. 507, 82 Pac. 555.

4. People v. Mendenhall, 135 Cal. 344, 350, 67 Pac. 325; People v. Clendennin, 91 Cal. 35, 27 Pac. 418; People v. O'Leary, 77 Cal. 30, 18 Pac. 856; People v. Bourke, 66 Cal. 455, 6 Pac. 89; People v. De La Cour Soto, 63 Cal. 166; People v. Herbert, 61 Cal. 544; People v. Johnson, 61 Cal. 142; People v. Gilbert, 60 Cal. 108; People v. Smith, 57 Cal. 130; People v. Brotherton, 47 Cal. 388, 407; People v. Best, 39 Cal. 690; People v. Trim, 39 Cal. 75; People v. Lafuente, 6 Cal. 202; People v. O'Leary, 3 Cal. Unrep. 102, 22 Pac. 24; People v. Johnson, 2 Cal. Unrep. 573, 8

So also the entire charge of the court should be incorporated in the record. If it appears that other instructions were given, the defendant must show that the instruction refused was not given elsewhere.⁵

§ 545. Order on Motion for New Trial.—An order denying a motion for a new trial cannot be reviewed unless the record shows that such a motion was made, and the grounds thereof,⁶ and unless the affidavits used at the hearing of the motion are properly incorporated in the record.⁷ It is also essential that it appear that the ground for new trial presented in the appellate court was specified as a ground for new trial in the trial court.⁸ An appellate court will not review an order on a motion for a new trial on the ground the verdict is against the evidence unless all material portions of the testimony are in the record.⁹ And a defendant appealing from an order refusing a new trial asked for upon the ground of newly discovered evidence must point out to the appellate court the newly discovered evidence, its materiality and the diligence used.

Pac. 690; *People v. Howland*, 13 Cal. App. 364, 109 Pac. 894; *People v. Simmons*, 7 Cal. App. 559, 565, 95 Pac. 48.

5. *People v. Von*, 78 Cal. 1, 20 Pac. 35; *People v. Vital*, 4 Cal. Unrep. 320, 34 Pac. 617 (setting aside submission of cause to enable the attorney general to file a complete record showing all the instructions).

6. *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Lennon*, 77 Cal. 308, 19 Pac. 521; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272; *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506; *People v. Frank*, 2 Cal. App. 283, 83 Pac. 578.

7. *People v. Welch*, 57 Cal. 138; *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058. See *supra*, § 538.

8. *People v. Ward*, 145 Cal. 736, 79 Pac. 448.

9. *People v. Woods*, 43 Cal. 176; *People v. Padillia*, 42 Cal. 535; *People v. York*, 9 Cal. 421 (holding that it is sufficient if the record contains the substance of all that was proved by the state). See *People v. Wilson*, 20 Cal. App. 40, 127 Pac. 1056, where the ground upon which the motion was based does not appear from the opinion, and the court merely states that the order denying a new trial cannot be considered in the absence of a reporter's transcript. See *supra*, § 543.

In the absence of such showing, it cannot be said that the trial court abused its discretion in denying the motion.¹⁰

VI. BRIEF.

Necessity for and Time for Filing.

§ 546. **In General.**—Subdivision 4 of rule II of the supreme court provides in part as follows:

“In criminal cases the appellant shall file his points and authorities (with proof of service of a copy thereof on the Attorney-General) within fifteen days after the filing of the transcript. The Attorney-General shall serve and file his points and authorities within fifteen days after service upon him of the appellant’s points, and within ten days thereafter the appellant may serve and file a reply.”

Since an appeal presupposes at least some debatable ground of complaint against the judgment and the manner of its procurement, it is the duty of the appellant to point out the specific points upon which he seeks to support his appeal. It is not the duty of the reviewing court, unaided by the appellant himself, to make an independent investigation for the purpose of ascertaining whether he has been legally or illegally convicted.¹¹ Indeed, it has been said, a failure to argue the case either orally or by brief may be deemed an admission that no cause exists for reversal.¹² If no brief is filed on behalf of the defendant and no appearance is made by or for him, when the cause is, in its regular order, called for hearing and argument (if it is not one where a judgment of death has been imposed), the appeal may be dismissed on motion of the attorney general pursuant to rule V of the supreme court,¹³

10. *People v. Davis*, 135 Cal. 162, 67 Pac. 59. 647, 145 Pac. 109; *People v. Mario*, 18 Cal. App. 70, 122 Pac. 76.

11. *People v. Wong Bow*, 38 Cal. App. 213, 175 Pac. 802; *People v. Allison*, 28 Cal. App. 126, 151 Pac. 550; *People v. Creitsner*, 25 Cal. App. 547, 145 Pac. 109; *People v. Warner*, 33 Cal. App. Dec. 560, 194 Pac. 513.

13. *People v. O'Brien*, 39 Cal. 686; *People v. Comedo*, 11 Cal. 70; *Peo-*

or the judgment may be affirmed without looking into the record, pursuant to section 1253 of the Penal Code,¹⁴ or the cause may be submitted on the record.¹⁵ This rule is not applicable, however, to capital cases. In such cases the court will carefully examine the record for the purpose of ascertaining whether there was any substantial error in the proceedings in the superior court, although no brief is filed or oral argument made on behalf of the appellant.¹⁶

ple v. Buck, 1 Cal. Unrep. 94; People v. Martin, 37 Cal. App. 213, 174 Pac. 91; People v. Wagner, 36 Cal. App. 41, 171 Pac. 699; People v. Magri, 32 Cal. App. 536, 163 Pac. 502; People v. Allison, 28 Cal. App. 126, 151 Pac. 550; People v. Creitsner, 25 Cal. App. 647, 145 Pac. 109; People v. Mario, 18 Cal. App. 70, 122 Pac. 76; People v. Tate, 17 Cal. App. 368, 119 Pac. 939; People v. Reese, 13 Cal. App. 327, 109 Pac. 640. See APPEAL AND ERROR, vol. 2, p. 739, where the rule is quoted.

14. People v. Albitre, 153 Cal. 367, 95 Pac. 653; People v. Clark, 121 Cal. 633, 54 Pac. 147; People v. Fahey, 134 Cal. xix, 66 Pac. 726; People v. Barber, 134 Cal. xix, 66 Pac. 725; People v. Gehrig, 7 Cal. Unrep. 149, 72 Pac. 717; People v. Lee Hung, 2 Cal. Unrep. 248, 3 Pac. 109; People v. Sterling, 36 Cal. App. Dec. 244, 201 Pac. 1116 (holding that upon an order to show cause why the judgment should not be affirmed for lack of prosecution of the appeal, ordinarily the appellate court will not consider the record further than to determine whether or not due diligence had been exercised in perfecting the appeal); People v. Young, 38 Cal. App. 492, 176 Pac. 696; People v. Clayton, 34 Cal. App. 495, 168 Pac.

160; People v. Roy, 26 Cal. App. 128, 146 Pac. 44; People v. Measor, 20 Cal. App. 339, 129 Pac. 469; People v. Watson, 19 Cal. App. 333, 126 Pac. 177; People v. Merle, 17 Cal. App. 365, 119 Pac. 674; People v. Hoffman, 18 Cal. App. 298, 109 Pac. 1112; People v. Whaley, 12 Cal. App. 542, 107 Pac. 1011.

Pen. Code, § 1253, provides that "The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear."

15. People v. Prince, 32 Cal. App. Dec. 805, 191 Pac. 1115; People v. Riccomini, 32 Cal. App. Dec. 384, 190 Pac. 1045; People v. Martinez, 43 Cal. App. 746, 185 Pac. 482; People v. Medaini, 40 Cal. App. 676, 181 Pac. 673; People v. Lyons, 36 Cal. App. 744, 173 Pac. 107; People v. Clark, 36 Cal. App. 739, 173 Pac. 102; People v. Wagner, 36 Cal. App. 41, 171 Pac. 699; People v. Maschini, 33 Cal. App. 424, 165 Pac. 546; People v. Magri, 32 Cal. App. 536, 163 Pac. 503; People v. Galli, 25 Cal. App. 633, 144 Pac. 973; People v. Wilson, 20 Cal. App. 40, 127 Pac. 1056. See *infra*, § 547.

16. People v. Negrete, 178 Cal. 802, 175 Pac. 81; People v. Burk, 159 Cal. 783, 115 Pac. 1101; People

§ 547. Review Where Case is Submitted on Record.—

When a case in which there is no appearance for the accused is submitted on the record, it is perhaps the duty of the reviewing court to give the record such an examination as will enable it to determine whether obvious errors prejudicial to the accused have been made,¹⁷ or whether any fundamental right of the defendant has been violated.¹⁸ If, for instance, it plainly appears that the information states no public offense, the court should not hesitate to order a reversal.¹⁹ But the court is not required to examine the record for the purpose of searching for possible errors, which, upon mature reflection, might have been detrimental to the rights of the accused. A general or cursory examination of the record is all that is required.²⁰ If from such an examination no error appears, the judgment will be affirmed.¹

v. Clark, 121 Cal. 633, 54 Pac. 147; People v. Hidaka, 142 Cal. xviii, 76 Pac. 1127; People v. Morasco, 4 Cal. Unrep. 889, 38 Pac. 423; People v. Sterling, 36 Cal. App. Dec. 244, 201 Pac. 1116 (in grave cases the court will permit the appellant to advance reasons why the judgment should not be modified); People v. Andrade, 31 Cal. App. 730, 161 Pac. 754.

17. People v. Medaini, 40 Cal. App. 676, 181 Pac. 673.

18. People v. Wilder, 34 Cal. App. Dec. 1058, 198 Pac. 841.

19. People v. Medaini, 40 Cal. App. 676, 181 Pac. 673.

20. People v. Poggi, 137 Cal. xix, 70 Pac. 292 (affirming judgment where no error appears on the face of the proceedings); People v. Wilder, 34 Cal. App. Dec. 1058, 198 Pac. 841; People v. Medaini, 40 Cal.

App. 676, 181 Pac. 673; People v. Perry, 16 Cal. App. 771, 117 Pac. 1036; People v. Rameriz, 16 Cal. App. 737, 117 Pac. 933; People v. Heck, 13 Cal. App. 677, 110 Pac. 525; People v. Sing, 2 Cal. App. 731, 84 Pac. 242 (where the court says that it does not feel called upon to examine the record for errors of law.)

1. People v. Day, 135 Cal. 360, 67 Pac. 1125; People v. Meskel, 154 Cal. xvi, 98 Pac. 860; People v. Poggi, 137 Cal. xix, 70 Pac. 292; People v. Goldberg, 10 Cal. 312; People v. Short, 5 Cal. Unrep. 158, 41 Pac. 862; People v. Batierrez, 1 Cal. Unrep. 726; People v. Warner, 33 Cal. App. Dec. 560, 194 Pac. 513; People v. Perry, 16 Cal. App. 771, 117 Pac. 1036; People v. Stanley, 13 Cal. App. 299, 109 Pac. 1112; People v. Hoffman, 13 Cal. App. 298, 109 Pac. 1112.

Requisites and Sufficiency.

§ 548. **In General.**—The briefs of counsel should conform to the rules of the supreme court,² but they need not be printed.³ They may be either printed or typewritten,⁴ and counsel for the appellant should state in his brief all the points relied upon for reversal. The practice of making points upon oral argument which are not made in the brief is unfair to counsel on the other side and is not commended, especially when no reason appears or is given why they were not made in the brief.⁵ While counsel is entitled to be heard upon every error he deems it his duty to raise, it is due to the orderly dispatch of business of the appellate courts that he should not insist upon errors in regard to matters of trifling import.⁶ The briefs should be confined to a discussion of the alleged errors contained in the record, and should not contain a discussion of matters wholly foreign to the questions presented for review.⁷ Neither should they contain reflections upon the action of the trial judge, especially when there is no justification therefor. To say that it was “a brutal abuse of discretion and an inhuman violation of his constitutional rights” to compel the defendant to go to trial in the face of an affidavit for continuance has been held to be grossly improper language to incorporate in a brief, even when the facts justify the charge.⁸

§ 549. **Pointing Out Errors.**—When assigning errors, it is the duty of counsel to direct the court’s particular attention to those matters which he regards of sufficient

2. See APPEAL AND ERROR, vol. 2, pp. 726, 729, 737.

3. Pen. Code, § 1247e.

4. S. C. rule II, subd. 4.

5. *People v. Modina*, 146 Cal. 142, 79 Pac. 832.

6. *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

7. *People v. Svendsen*, 25 Cal. App. 1, 142 Pac. 861.

8. *People v. Buck*, 151 Cal. 667, 674, 91 Pac. 529.

moment to affect the substantial rights of his client.⁹ He should point out clearly and concisely the rulings complained of as erroneous.¹⁰ In doing so he should refer to the folio and page of the transcript where the ruling is to be found,¹¹ and make his reference so explicit that it is unnecessary for the court to explore the transcript to discover the point referred to.¹² A failure to do so justifies the court in refusing to consider the objection.¹³ It is not sufficient for him merely to refer to the folios of the transcript where the alleged erroneous rulings are found.¹⁴ Hence, it is the duty of counsel alleging error in the giving of instructions to point out and state the particular instruction the giving, refusing, or modification of which is claimed to be error.¹⁵ The court is not called upon to examine instructions designated only by number,¹⁶ or by a reference to the page or folio of the transcript.¹⁷ A refusal to give instructions will not be reviewed where the

9. *People v. Gibson*, 106 Cal. 458, 475, 39 Pac. 864; *People v. Foster*, 32 Cal. App. Dec. 865, 192 Pac. 142 (misconduct of counsel).

10. *People v. Clark*, 183 Cal. 677, 192 Pac. 521; *People v. Creeks*, 141 Cal. 529, 533, 75 Pac. 101; *People v. McLean*, 135 Cal. 306, 67 Pac. 770; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Marsiglia*, 35 Cal. App. Dec. 61, 198 Pac. 1007; *People v. Fealy*, 33 Cal. App. 605, 614, 165 Pac. 1034.

11. *People v. Clark*, 183 Cal. 677, 192 Pac. 521; *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303.

12. *People v. Daily*, 135 Cal. 104, 67 Pac. 16.

13. *People v. Daily*, 135 Cal. 104, 67 Pac. 16 (holding that an appellant should not make so meager references to errors as to throw upon the court the labor of dis-

covering what the nature of the alleged error is).

14. *People v. Daniels*, 4 Cal. Unrep. 248, 34 Pac. 233; *People v. Guaragna*, 23 Cal. App. 120, 137 Pac. 279; *People v. Palassou*, 14 Cal. App. 123, 111 Pac. 109.

15. *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340; *People v. Deatrick*, 30 Cal. App. 507, 513, 159 Pac. 175; *People v. Stein*, 23 Cal. App. 108, 117, 137 Pac. 271; *People v. Driggs*, 14 Cal. App. 508; *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384; *People v. Hemple*, 4 Cal. App. 120, 87 Pac. 227.

16. *People v. Duncan*, 22 Cal. App. 430, 438, 134 Pac. 797.

17. *People v. Mead*, 145 Cal. 500, 78 Pac. 1047; *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340; *People v. Castro*, 42 Cal. App. 453, 183 Pac. 828; *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

appellant merely states the refusal to give all the instructions requested is error.¹⁸

§ 550. Argument and Authority.—In addition to pointing out the rulings complained of, it is the duty of counsel to state in his brief his reasons for deeming the ruling erroneous,¹⁹ and refer to the authorities in support thereof, if any.²⁰ He should also show that the errors pointed out were of such magnitude as to have prejudiced the defendant's rights or prevented him from obtaining a fair and impartial trial.¹ The raising of questions relating to errors in rulings of the trial court without argument or citation of authority has often been condemned,² and in ordinary cases justifies an appellate court in refusing to consider them,³ especially when they are obviously

18. *People v. Whitlow*, 24 Cal. App. 1, 139 Pac. 826; *People v. Howard*, 3 Cal. App. 36, 84 Pac. 462.

19. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. McLean*, 135 Cal. 306, 67 Pac. 770; *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Woon Tuck Wo*, 120 Cal. 294, 297, 52 Pac. 833; *People v. Cady*, 117 Cal. 10, 48 Pac. 908; *People v. Gibson*, 106 Cal. 458, 475, 39 Pac. 864; *People v. Daniels*, 4 Cal. Unrep. 248, 34 Pac. 233; *People v. Zarate*, 36 Cal. App. Dec. 250, 201 Pac. 955; *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46; *People v. Castro*, 42 Cal. App. 453, 183 Pac. 828; *People v. Goodrich*, 41 Cal. App. 38, 181 Pac. 805; *People v. Ruiz*, 39 Cal. App. 593, 179 Pac. 691; *People v. Wademan*, 38 Cal. App. 116, 132, 175 Pac. 791; *People v. Deatruck*, 30 Cal. App. 507, 513, 159 Pac. 175; *People v. Valencia*, 27 Cal. App. 407, 150

Pac. 68; *People v. Driggs*, 14 Cal. App. 508, 112 Pac. 577; *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384; *People v. Oliver*, 7 Cal. App. 601, 605, 95 Pac. 172.

20. *People v. Clark*, 183 Cal. 677, 192 Pac. 521; *People v. McLean*, 135 Cal. 306, 67 Pac. 770; *People v. Emmons*, 13 Cal. App. 487, 496, 110 Pac. 151; *People v. Daniels*, 4 Cal. Unrep. 248, 34 Pac. 233.

1. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Foster*, 32 Cal. App. Dec. 865, 192 Pac. 142.

2. *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123.

3. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442; *People v. Monroe*, 138 Cal. 97, 70 Pac. 1072; *People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Zarate*, 36 Cal. App. Dec. 250, 201 Pac. 955; *People v. De Vries*, 35 Cal. App. Dec. 263, 199 Pac. 867; *People v. Swaile*, 12 Cal.

without merit.⁴ Indeed, it has been said that a failure to discuss a ruling is a tacit recognition that no error was committed in making it.⁵ This is not a hard-and-fast rule, however, and an appellate court may review the question if it is disposed to do so.⁶ It is not a sufficient compliance with this rule to state that the trial court erred in refusing to give an instruction and cite a code section without quoting it, as it is not the duty of an appellate court to examine code sections in order to discover error for the purpose of reversing a case.⁷ Accordingly, when it is claimed that an information charges a different offense from that for which a defendant was held to answer, counsel in his brief should point out wherein they differ.⁸ And when objecting to the insufficiency of the evidence to sustain the verdict, he should point out in what respects the evidence is insufficient.⁹

Rule in capital cases.—In grave cases, that is to say, in cases where the death penalty is imposed, the court will depart from the general rule and examine alleged errors assigned without argument or authority.¹⁰ This relaxation of the rule does not, however, extend to cases of imprisonment for life.¹¹

App. 192, 198, 107 Pac. 134; *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668.

4. *People v. Rulia Singh*, 182 Cal. 457, 480, 188 Pac. 987; *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833.

5. *People v. Durrant*, 116 Cal. 179, 221, 48 Pac. 75.

6. *Hill v. Barner*, 8 Cal. App. 58, 68, 96 Pac. 111 (distinguishing *People v. Gibson*, 106 Cal. 475, 39 Pac. 864).

7. *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340.

8. *People v. Seifert*, 14 Cal. App. 182, 111 Pac. 270.

9. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. Bordet*, 13 Cal. App. 426, 110 Pac. 155.

10. *People v. Hadley*, 175 Cal. 118, 165 Pac. 442; *People v. Glover*, 141 Cal. 233, 243, 74 Pac. 745; *People v. Glaze*, 139 Cal. 154, 163, 72 Pac. 965.

11. *People v. Glaze*, 139 Cal. 154, 163, 72 Pac. 965 (citing *People v. Busby*, 113 Cal. 181, 45 Pac. 191).

VII. SUPERSEDEAS AND STAY.

§ 551. **In General.**—It is provided by the code that

“An appeal taken by the people in no case stays or affects the operation of a judgment in favor of the defendant, until judgment is reversed.”¹²

“An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise.”¹³

It is apparent from the latter section of the code that there is no stay of execution pending an appeal from a judgment without a certificate of probable cause except in capital cases. And even in the latter case, the appeal stays the infliction of the death penalty only. This is true notwithstanding the fact that the statute provides that the prisoner is to be confined in the state prison pending the execution of the sentence. If this imprisonment be regarded as a part of the penalty, it stands upon the same grounds as other judgments of imprisonment, and is not stayed without a certificate of probable cause for the appeal.¹⁴ Again, section 1243 of the Penal Code relates solely to an appeal from a “judgment of conviction.” It follows that upon an appeal from any other order, for example, an order made after final judgment, a certificate of probable cause granted by a single justice would not stay execution of the judgment,¹⁵ although it has been held

12. Pen. Code, § 1242.

13. Pen. Code, § 1243; *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378; *People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078.

14. *Ex parte Fredericks*, 104 Cal. 400, 38 Pac. 51.

15. *People v. Ross*, 135 Cal. 59, 67 Pac. 13 (explaining *People v. McNulty*, 95 Cal. 594, 30 Pac. 963); *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

that in such case a certificate may be granted by the appellate court in aid of its appellate jurisdiction.¹⁶

When a writ of error is allowed from a decision of the supreme court to the United States supreme court, it operates as a supersedeas from the date of its allowance, and the sentence is suspended until the decision of the supreme court of the United States upon the matter to be reviewed is regularly certified to the supreme court of the state.¹⁷

§ 552. By What Judge Certificate of Probable Cause may be Granted.—The judge of the trial court and the several justices of the appellate courts have original concurrent and co-ordinate jurisdiction to issue certificates of probable cause.¹⁸ If the judge who tried the case is absent, the other judges of the superior court have power to stay proceedings during his absence.¹⁹ While section 1243 of the Penal Code does not purport in express terms to confer such power upon the justices of the district courts of appeal, it is clear, under the terms of section 4 of article VI of the constitution, that when an appeal is taken to a district court of appeal, the only officers authorized to give a certificate of probable cause are the judge of the trial court or some justice of the district court of appeal, to which the appeal is taken.²⁰ It follows that a justice of the supreme court cannot give a certificate in such a case.¹ Although the jurisdiction of a justice of

16. *People v. Ross*, 135 Cal. 40, 67 Pac. 13; *People v. Durrant*, 119 Cal. 54, 50 Pac. 1070.

17. *Ex parte Rodley*, 132 Cal. 40, 64 Pac. 91.

18. *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

19. *People v. Clark*, 125 Cal. 251, 57 Pac. 986.

20. *Glass v. Lawlor*, 152 Cal. 602, 93 Pac. 490; *In re Murphy*, 185 Cal. 298, 197 Pac. 59; *Ex parte Mayen*, 78 Cal. App. Dec. 375, 193 Pac. 813.

The section of the constitution referred to in the text is as follows: "All statutes now in force, providing for, or regulating appeals to the supreme court shall apply to appeals to the district courts of appeal so far as such statutes are not inconsistent with this article and until the legislature shall otherwise provide."

1. *In re Murphy*, 185 Cal. 298, 197 Pac. 59.

an appellate court with respect to the issuance of the certificate is co-ordinate with that of the trial judge, in practice, no justice of an appellate court will consider an application for the certificate, until after the authority of the trial judge has been invoked.² If the trial judge refuses or neglects to pass upon the question whether there is probable cause for the appeal, or improperly denies a certificate to that effect, the defendant may make an application therefor to a justice of the court to which the appeal is taken,³ even though he may have commenced serving his sentence. The refusal on the part of the trial judge to issue a certificate or grant a stay is no bar to an exercise of like jurisdiction by a justice of the appellate court, and the situation is no different where the trial judge revokes a certificate already granted by him, as such revocation leaves the case in the same situation it would have been if the certificate had been refused in the first instance.⁴

§ 553. Stay Pending Application to Appellate Justice.—

The right of a defendant to renew his application for a stay of execution before a justice of an appellate court includes a right to a reasonable stay until he can, exercising proper diligence, have the record made up and certified to the appellate court for examination—such record being the essential basis of any action by any other judge than the trial judge.⁵ It is the plain duty of the trial judge to grant such temporary stay.⁶ If for any reason he re-

2. *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

3. *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378; *People v. Clark*, 125 Cal. 251, 57 Pac. 986; *People v. Durrant*, 119 Cal. 201, 209, 51 Pac. 185; *People v. Lane*, 96 Cal. 596, 31 Pac. 580; *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

4. *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

5. *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378 (if demanded, the stay should be extended to a reasonable time after the bill of exceptions has been duly certified); *People v. Clark*, 125 Cal. 251, 57 Pac. 986.

6. *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378; *People v. Lane*, 96 Cal. 596, 31 Pac. 580; *In re Adams*, 81 Cal. 163, 22 Pac. 547.

fuses to do so, a justice of the appellate court may grant it as an incident to his power to act upon the application.⁷ Indeed, it has been said that the justices of the appellate court have no discretion to refuse such a stay.⁸

§ 554. Application and Proceedings Thereon.—When a defendant makes application to a justice of an appellate court for a certificate of probable cause, he is required to give notice thereof to the district attorney,⁹ and produce a record of the case as it will be presented to the appellate court.¹⁰ The burden rests upon him to convince the judge or justice that there is some merit in his appeal,—some probable cause for his appeal.¹¹ The expression “probable cause for the appeal” is not the equivalent of “probable cause for reversal of the judgment,” but means only that there is presented a case that is debatable, one that is not clearly and palpably frivolous and vexatious, or one upon which there is room for an honest difference of opinion as to the existence of any prejudicial error in the proceedings leading to the conviction. When such a case is presented, it is the duty of the judge to whom application is made to grant the certificate, notwithstanding his own opinion that the record is free from error.¹² The judge should give the prisoner the benefit of every doubt, as to matters which might be reviewed in the appellate court,¹³ and exercises his discretion liberally

7. *People v. Clark*, 125 Cal. 251, 57 Pac. 986; *People v. Lane*, 96 Cal. 596, 31 Pac. 580; *In re Adams*, 81 Cal. 163, 22 Pac. 547; *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813; *People v. Lee*, 9 Cal. App. 590, 99 Pac. 1110.

8. *People v. Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 173.

9. *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378; *In re Adams*, 81 Cal. 163, 22 Pac. 547.

10. *People v. McNulty*, 95 Cal. 594, 30 Pac. 963; *In re Adams*, 81 Cal. 163, 22 Pac. 547. See *supra*, § 553.

11. *People v. McNulty*, 95 Cal. 594, 30 Pac. 963.

12. *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378; *In re Adams*, 81 Cal. 163, 22 Pac. 547; *People v. Valencia*, 45 Cal. 304.

13. *In re Adams*, 81 Cal. 163, 22 Pac. 547; *People v. Valencia*, 45 Cal. 304.

in certifying to the probable cause for the appeal whenever a case is presented upon which candid minds might rationally differ.¹⁴ In other words, a defendant is entitled to a stay of execution when his appeal is not clearly frivolous.¹⁵ It has been held that an unsuccessful attempt of a defendant to escape from custody does not deprive him of his right to a certificate of probable cause.¹⁶

§ 555. Effect of Supersedeas.—A certificate of probable cause, in all its effects, is substantially the equivalent of an order staying execution pending an appeal from a judgment of conviction. Its filing with the clerk operates as a supersedeas, and suspends the judgment and all proceedings thereon during the stay.¹⁷ It is provided by the code that if the certificate of probable cause is filed, “the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal.”¹⁸ And it is further provided that where, before the granting of the certificate, the execution of the judgment has commenced, “the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody.”¹⁹ If the warden of the state prison refuses to comply with section 1245 of the Penal Code, the prisoner may invoke the remedy of habeas corpus. It is not necessary for him to resort to a mandamus proceeding to which the

14. *In re Adams*, 81 Cal. 163, 22 Pac. 547.

15. *People v. Gallanar*, 144 Cal. 656, 79 Pac. 378.

16. *People v. Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 173.

17. *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

18. Pen. Code, § 1244; *In re Adams*, 81 Cal. 163, 22 Pac. 547.

See *Ex parte Rodley*, 132 Cal. 40, 64 Pac. 91 (holding that pending a writ of error to the supreme court of the United States, the prisoner must remain in the custody of the sheriff at the usual place of confinement).

19. Pen. Code, § 1245; *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813.

sheriff into whose custody he is to be remanded is a party.²⁰

VIII. DISMISSAL, HEARING AND REHEARING.

§ 556. Dismissal.—The Penal Code provides as follows:

“If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day, on motion of the respondent, upon five days’ notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed.¹

“The court may also, upon like motion, dismiss the appeal, if the return is not made as provided in section twelve hundred and forty-six, unless for good cause they enlarge the time for that purpose.”²

Furthermore, an appeal shall be deemed dismissed if the application mentioned in section 1247 of the Penal Code is not filed within the time prescribed therein.³ It is also a ground for dismissing an appeal that the case is not within the jurisdiction of the appellate court,⁴ or that the

20. *Ex parte Mayen*, 33 Cal. App. Dec. 375, 193 Pac. 813. See *HABEAS CORPUS*.

1. Pen. Code, § 1248; *People v. Walker*, 132 Cal. 137, 64 Pac. 133 (tardy appeal); *People v. Colon*, 119 Cal. 668, 51 Pac. 1082; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720 (appeal taken after time limited by the code); *People v. McNulty*, 95 Cal. 594, 30 Pac. 963 (whether an appeal is irregular in some substantial particular is to be determined by reference to the order or judgment appealed from and the steps taken to perfect the appeal); *People v. Bell*, 70 Cal. 33, 11 Pac. 327; *People v. Harrison*, 13 Cal. App. 55, 110 Pac. 345 (refusing to dismiss appeal for failure of original record to show a notice

of appeal, where an additional and supplemental record filed by leave of court showed such notice was given); *People v. Varnum*, 53 Cal. 630 (tardy appeal); *People v. Finerty*, 8 Cal. App. 466, 97 Pac. 73. See *People v. Brown*, 148 Cal. 743, 84 Pac. 204, affirming the judgment. See *supra*, § 539.

2. Pen. Code, § 1249; *People v. Frink*, 2 Cal. Unrep. 736, 12 Pac. 616.

3. *People v. Ali*, 38 Cal. App. 544, 176 Pac. 883. See *supra*, § 533.

4. *People v. Cornell*, 16 Cal. 187 (dismissing an appeal in a misdemeanor case when the constitution limited the jurisdiction of the supreme court to felony cases); *People v. Peralta*, 3 Cal. 379.

appeal was taken from a nonappealable order, or in a case in which an appeal is not authorized,⁵ or that the questions have become moot,⁶ or that no brief was filed by the appellant and no appearance was made on the date set for the hearing of the case.⁷ There can be no dismissal of an appeal, however, upon the ground that it is frivolous, as a motion upon this ground is in effect a motion for a summary hearing of the appeal and an affirmance of the judgment or order appealed from.⁸ By section 1248 of the Penal Code, the appellate court is forbidden to dismiss an appeal for irregularity unless of some substantial particular.⁹ As said in one case:

“The right of appeal is conferred by the constitution, and statutes and rules of procedure for its exercise are to be liberally construed; and no appeal will be dismissed upon technical grounds, where there has been no violation or disregard of any express rule of procedure.”¹⁰

Effect of escape of defendant.—Under the constitution and the Penal Code a person charged with crime can appear and defend only when in actual or constructive custody, and has no longer a right to appear by counsel, when he has escaped from custody and is at large.¹¹ Accordingly, where a defendant has escaped from jail pend-

5. *People v. Higgins*, 114 Cal. 63, 45 Pac. 1004 (appeal by people); *People v. Hollis*, 65 Cal. 78, 2 Pac. 893 (stating that under the former practice the court sometimes struck the attempted appeal from the calendar instead of dismissing it).

6. *People v. Thompson*, 5 Cal. Unrep. 533, 46 Pac. 907 (dismissing appeal from an order fixing the day for execution of a sentence of death, where the day fixed has passed); *People v. Durrant*, 119 Cal. 176, 204, 51 Pac. 185 (refusing to dismiss the appeal, although the questions had become moot, as

some important points of practice were involved).

7. See *supra*, § 546.

8. *People v. McNulty*, 95 Cal. 594, 30 Pac. 963 (followed in *Randall v. Duff*, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803).

9. *People v. McNulty*, 95 Cal. 594, 30 Pac. 963.

10. *People v. Preciado*, 31 Cal. App. 519, 160 Pac. 1090 (quoting Justice Harrison in *Estate of Nelson*, 128 Cal. 242, 60 Pac. 772).

11. *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32.

ing an appeal taken by him, the appeal will be dismissed, unless he should return to custody within a limited time.¹²

§ 557. **Hearing.**—It is provided in rule XVII of the supreme court that criminal causes shall be placed at the head of the calendar. Accordingly, criminal causes are regularly placed on the first calendar made up, whether for Sacramento, Los Angeles or San Francisco, after the records are filed, regardless of the county in which the charges were tried.¹³ Where the attorney general confesses error, the defendant cannot object to an immediate submission of the appeal, contending that under the rules of court, the case must go on the calendar after the regular time for filing briefs and be orally argued, where the only purpose of the objection is to cause delay.¹⁴

Under section 1252 of the Penal Code,

“All appeals must be heard and determined by the appellate court within sixty days after the record is filed in said appellate court, unless continued on motion or with the consent of the defendant.”

Unlike section 1382 of that code, section 1252 is directory merely. Hence, a mere noncompliance therewith does not entitle the defendant to a reversal of the judgment and a discharge from custody.¹⁵

“The defendant need not personally appear in the appellate court.”¹⁶

“Upon the argument of the appeal, if the offense is punishable with death, two counsel must be heard on each side, if they require it. In any other case the court may,

12. *People v. Elkins*, 122 Cal. 654, 55 Pac. 599; *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32 (cited as authority in *Allen v. Georgia*, 166 U. S. 138, 142, 41 L. Ed. 949, 17 Sup. Ct. Rep. 525, and distinguished in *Vosburg v. Vosburg*, 131 Cal. 628, 63 Pac. 1009); *People v. Sitz*, 21 Cal. App. 54, 130 Pac. 858.

13. *People v. McDermott*, 97 Cal. 247, 32 Pac. 7.

14. *People v. Durrant*, 119 Cal. 176, 203, 206, 51 Pac. 185.

15. *People v. Staples*, 91 Cal. 23, 29, 27 Pac. 523.

16. Pen. Code, § 1255; *People v. Redinger*, 55 Cal. 290, 298, 36 Am. Rep. 32.

in its discretion, restrict the argument to one counsel on each side."¹⁷

§ 558. Judicial Notice by Appellate Courts.—The appellate court takes judicial notice of facts in the same manner as does the trial court. But if a trial court makes a statement of a fact within its notice, it will be assumed upon appeal, in the absence of any manifest error in the statement, that the fact was as stated by the trial court. And the appellant has the burden of showing error.¹⁸ As matters which are established by law, an appellate court will take judicial notice of the location of judicial districts,¹⁹ and of the place of imprisonment and manner of executing judgments of justices, police and superior courts.²⁰ It will also take notice that a particular act is or is not a crime under the general laws of the state,¹ and that the sheriff is the legal keeper of the jail of the county of which he is such officer.² The court is obliged to take notice of the accession of a superior judge to office and of his signature.³ It will also take judicial notice of matters of common knowledge,⁴ such as the measure of time, and of the coincidence of the days of the week with the days of the month.⁵ It cannot, however, take judicial notice of the death of counsel for the defendant after conviction and before appeal taken.⁶

17. Pen. Code, § 1254.

18. *People v. Mayes*, 113 Cal. 618, 626, 45 Pac. 860.

19. *People v. Robinson*, 17 Cal. 363.

20. *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 489, 107 Pac. 712.

1. *Ex parte Kearny*, 55 Cal. 212, 221.

2. *Ex parte Bargagliotti*, 6 Cal. App. 333, 92 Pac. 96.

3. Code Civ. Proc., § 1875, subd. 5; *People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078; *People v. Knoblock*, 11 Cal. App. 333, 104 Pac. 1012.

4. *People v. Tinnen*, 60 Cal. Dec. 355, 32 Cal. App. Dec. 1067, 192 Pac. 557 (where the court noticed that certain narcotics produce sleep through the process of inhalation).

5. *People v. Rudolph*, 28 Cal. App. 683, 153 Pac. 721.

6. *People v. Lee Gow*, 38 Cal. App. 248, 175 Pac. 917.

§ 559. **Rehearing.**—An appellate court has inherent power to order a rehearing of causes decided by it.⁷ The rule in civil actions that cases should be fully argued before submission without a reservation of other points to be used on petition for rehearing,⁸ is equally applicable to criminal cases.⁹ But in cases involving life the rule will be dispensed with altogether, and in cases otherwise involving peculiar or real hardship will be applied with less strictness.¹⁰ However, a rehearing will not be granted for the purpose of considering new points which are purely technical.¹¹

Hearing in supreme court after decision in appellate court.—The supreme court is authorized by the constitution to order a hearing before itself of causes decided by a district court of appeal, within thirty days after such judgment of the latter court shall have become final therein.¹² As in civil cases, a rehearing in the supreme court of a case decided by a district court of appeal will be granted only when error appears upon the face of the opinion of the appellate court, or when a doubtful and important question is presented upon which the court desires to

7. See *People v. Tanner*, 2 Cal. 257, in which on a petition for rehearing in vacation, after a judgment affirming a capital conviction, a justice ordered a stay of execution until the petition could be heard by the court.

See subdivision 6 of Rule II of the supreme court as to rules governing the filing of petition for rehearing.

8. See *APPEAL AND ERROR*, vol. 2, p. 790.

9. *People v. Northey*, 77 Cal. 618, 635, 19 Pac. 865, 20 Pac. 129 (per opinion denying rehearing); *People v. Ruef*, 14 Cal. App. 176, 620, 114

Pac. 48, 54 (denying rehearing to consider the question of the sufficiency of the indictment presented for the first time on rehearing).

10. *People v. Northey*, 77 Cal. 618, 635, 19 Pac. 865, 20 Pac. 129; *People v. Bruggy*, 3 Cal. Unrep. 415, 26 Pac. 965 (holding that the rule will be dispensed with in favor of a defendant appealing from a judgment of death).

11. *People v. Northey*, 77 Cal. 618, 635, 19 Pac. 865, 20 Pac. 129 (per opinion denying rehearing).

12. See *APPEAL AND ERROR*, vol. 2, p. 795. See *COURTS*, vol. 7, p. 673, for discussion of transfer of cause before decision in appellate court.

hear further argument.¹³ Where the record leaves no doubt as to the guilt of a defendant, a rehearing in the supreme court will not be granted because of any error in the opinion of the district court of appeal as to the admissibility of evidence.¹⁴

IX. REVIEW.

Introductory.

§ 560. **In General.**—Any action of the court during the progress of a trial which deprives a defendant of a substantial legal right or to any extent to his prejudice withholds a substantial legal or constitutional privilege claimed by him on the trial may be reviewed upon appeal. For example, the court may review a ruling of the trial court refusing to direct that the manacles be removed from the defendant while in court,¹⁵ and a refusal of an instruction advising a verdict of acquittal.¹⁶ Upon an appeal from a judgment of conviction, the appellant has a right to present the question whether or not the police court committing him was legally established, the rule forbidding one, in a collateral proceeding, from trying the right of someone to hold an existing office having no application.¹⁷ But facts and circumstances which cannot be considered by the trial court or jury in determining the guilt or innocence of an accused cannot

13. *People v. Donaldson*, 36 Cal. App. 63, 67, 171 Pac. 442 (citing *Rauer's Law etc. Co. v. Berthiaume*, 21 Cal. App. 675, 132 Pac. 596, 833); *People v. Vaughn*, 25 Cal. App. 736, 147 Pac. 116, 117. See *APPEAL AND ERROR*, vol. 2, p. 796.

14. *People v. Northcott*, 59 Cal. Dec. 415, 31 Cal. App. Dec. 346, 189 Pac. 704 (per opinion of supreme court denying hearing).

15. *People v. Harrington*, 42 Cal.

165, 10 Am. Rep. 296 (disapproving a contention of the attorney general that the action of the trial court was no part of the trial and could not be reviewed).

16. *People v. Ward*, 145 Cal. 736, 79 Pac. 448 (limiting the effect of a contrary dictum in *People v. Lewis*, 124 Cal. 553).

17. *People v. Toal*, 85 Cal. 333, 24 Pac. 603.

be resorted to in a court of appeal to support a verdict not otherwise authorized. Thus, the fact that a defendant did not take the stand in his own behalf cannot be considered upon the point of the sufficiency of the evidence to justify the verdict.¹⁸ In criminal cases, particularly in capital cases, the law is reluctant to deny a defendant a full consideration of his points because of technical errors or omissions of his counsel.¹⁹ When in a criminal case it is sufficiently clear from the entire record that a defendant intended and attempted to avail himself of a statutory right, and that this could not have been misunderstood by the trial court, the appellate court will not refuse a discussion of the point upon technical grounds. For instance, notwithstanding a misquotation of the title, chapter and section of the Penal Code upon which a motion is based, a ruling on a motion will be reviewed, if its nature was understood by the trial court and otherwise appears from the record.²⁰ An appellate court may refuse to review matters presented upon an appeal by the state where to do so would be a vain act, as, for example, where the defendant was in jeopardy and could not again be tried.¹ An appellate court will not review moot questions.² And it will not discuss or decide questions which may not arise upon a new trial or which, if they do, may arise under very different circumstances.³ For example, where the case must go back for a new trial, the court will not discuss the sufficiency of the evidence to justify the verdict.⁴

18. *People v. Page*, 116 Cal. 386, 48 Pac. 326.

19. *People v. Durrant*, 116 Cal. 179, 217, 48 Pac. 75.

20. *People v. Kirby*, 15 Cal. App. 265, 114 Pac. 794.

1. *People v. Hill*, 146 Cal. 145, 79 Pac. 845. See *infra*, § 610.

2. *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511.

Where it appears that the only offense committed was some offense

not alleged, it is evident that the case cannot be tried again upon the charge in the indictment; therefore any remaining questions urged upon the appeal are merely moot questions not calling for determination; *People v. Lewis*, 127 Cal. 207, 59 Pac. 830.

3. *People v. Brown*, 72 Cal. 390, 14 Pac. 90.

4. *People v. Lambert*, 120 Cal. 170, 177, 52 Pac. 307.

§ 561. Scope of Review.—Under section 1259 of the Penal Code, the appellate court may, upon an appeal taken by the defendant in open court, review all matters in the record if properly presented.⁵ There is not now and never has been any provision in the Penal Code specifically enumerating and so restricting the number or nature of the points which may be reviewed on appeal from a judgment of conviction.⁶ Upon an appeal from such a judgment, an appellate court may review the following orders, provided they are properly incorporated in the record on appeal: an order overruling a demurrer;⁷ an order denying a motion to set aside an indictment or information;⁸ a ruling denying a motion for a postponement of the trial;⁹ a denial of a motion to instruct the jury to acquit;¹⁰ and an order denying a motion in arrest of judgment.¹¹ The court may also review the sufficiency of the indictment or information,¹² any grounds of exception mentioned in former section 1170 of the Penal Code,¹³ and, it seems, the sufficiency of the evidence to justify the verdict.¹⁴ How-

5. *People v. Grider*, 13 Cal. App. 705, 110 Pac. 586. See *supra*, § 523, where section 1259 of the Penal Code is quoted.

6. *People v. Clayton*, 33 Cal. App. 357, 165 Pac. 37.

7. *People v. Turner*, 39 Cal. 370.

8. *People v. Simmons*, 119 Cal. 1, 50 Pac. 844; *People v. Turner*, 39 Cal. 370; *People v. Izlar*, 8 Cal. App. 600, 97 Pac. 685; *People v. Williams*, 8 Cal. App. 595, 97 Pac. 684.

9. *People v. Buck*, 151 Cal. 667, 91 Pac. 529.

10. *People v. Ward*, 145 Cal. 736, 79 Pac. 448.

11. *People v. Williams*, 184 Cal. 590, 194 Pac. 1019; *People v. Bundy*, 168 Cal. 777, 145 Pac. 537; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100;

People v. Walker, 132 Cal. 137, 64 Pac. 133; *People v. Thompson*, 115 Cal. 160, 46 Pac. 912; *People v. Turner*, 39 Cal. 370; *People v. Peery*, 26 Cal. App. 143, 146 Pac. 44; *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513.

12. *Ex parte Goldman*, 7 Cal. Unrep. 254, 88 Pac. 819.

13. See *supra*, § 525.

14. *People v. Clayton*, 33 Cal. App. 357, 165 Pac. 37. See *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441, where the court conceded that the order denying a new trial is not appealable but nevertheless reviewed the sufficiency of the evidence. See, also, *People v. Grider*, 13 Cal. App. 705, 110 Pac. 586; where, upon an appeal in open court, the sufficiency of the evidence was reviewed. See *supra*, § 526.

ever this may be, a denial of a motion to instruct the jury to acquit is the subject of exception under section 1170 of the Penal Code and is reviewable on appeal from the judgment. This exception equally with a motion for new trial on the ground of insufficiency of the evidence raises the question as to the sufficiency of the evidence.¹⁵ Since misconduct of the district attorney unaccompanied by an error of the court is not a ground for a new trial, it follows that it can be reviewed only on an appeal from the judgment, when presented by a proper record and the point has been saved for review by exception.¹⁶ If the trial court refuses, upon objection, to take any heed of the misconduct, its error may be made the basis of a motion for a new trial and it has been held is reviewable upon appeal from the judgment.¹⁷ Appealable orders made after judgment cannot be reviewed upon an appeal from the judgment.¹⁸ And it has been held that an order denying a new trial cannot be reviewed if no appeal is taken therefrom.¹⁹ Upon an appeal from an order denying a new trial the court cannot consider defects in the indictment or information.²⁰

§ 562. Review of Errors Favorable to Defendant.—To warrant an interference with a judgment against a defendant, his substantial rights must have been injuriously

15. *People v. Ward*, 145 Cal. 736, 79 Pac. 448.

16. *People v. Amer*, 151 Cal. 303, 90 Pac. 698; *People v. Pang Sui Lin*, 15 Cal. App. 260, 114 Pac. 582. *Contra: People v. Amer*, 8 Cal. App. 137, 96 Pac. 401 (per Hart, J., dissenting).

17. *People v. Hail*, 25 Cal. App. 346, 356, 143 Pac. 803 (case involving, however, an appeal from the judgment and an order denying a new trial); *People v. Grider*, 13 Cal. App. 705, 110 Pac. 586.

18. *People v. Ebanks*, 117 Cal. 652, 666, 40 L. R. A. 269, 49 Pac. 1049.

19. *People v. Ingersoll*, 21 Cal. App. 763, 132 Pac. 1052 (where the defendant appealed from the judgment and an order denying his motion to vacate an order refusing a new trial, but not from the order refusing a new trial). See *supra*, §§ 508, 529, as to right to appeal from order denying new trial.

20. *People v. Sanchez*, 23 Cal. App. 742, 139 Pac. 820.

affected by the error complained of. It follows, therefore, that a defendant cannot complain of errors favorable to him.¹ For example, a defendant cannot complain of the introduction of evidence which is favorable to him,² of an erroneous ruling excluding evidence offered by the people,³ of remarks of the court which are favorable to him,⁴ of an error in ordering into custody a witness for the people,⁵ or of errors in instructions in his favor.⁶ He cannot complain of an instruction authorizing a conviction of a lesser crime than the evidence justifies,⁷ of a failure to instruct a jury with reference to lesser crimes included in the charge,⁸ of an instruction that a witness is an accomplice,⁹ of an instruction directing, instead of advising,

1. *People v. Glover*, 141 Cal. 233, 243, 74 Pac. 745 (where the jury was restricted to one of several rules for determining malice); *People v. Valliere*, 123 Cal. 576, 56 Pac. 433; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Bush*, 68 Cal. 623, 10 Pac. 169; *People v. Barnhart*, 59 Cal. 381; *People v. Brotherton*, 47 Cal. 388, 404; *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493 (where defendant under a former statute received a less sentence than he deserved); *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172 (holding, under the former statute relating to the imposition of sentence, that the pronouncement of a sentence for less than the minimum provided by law was error in defendant's favor).

2. *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681.

3. *People v. Norega*, 48 Cal. 123.

The fact that a court erroneously sustains defendant's objection to a question does not render erroneous a second ruling overruling the same objection to a similar question. The first ruling being in favor of the

defendant, cannot be objected to as erroneous upon appeal. *People v. Valliere*, 123 Cal. 576, 56 Pac. 433.

4. *People v. Soeder*, 150 Cal. 12, 18, 87 Pac. 1016 (where a remark of the court intimated a doubt as to the truth of evidence given by a witness for the prosecution); *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693.

5. *People v. Wing*, 23 Cal. App. 50, 53, 137 Pac. 47.

6. *People v. Lundin*, 120 Cal. 308, 52 Pac. 807; *People v. Sternberg*, 111 Cal. 3, 6, 43 Pac. 198; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375; *People v. Ferris*, 55 Cal. 538; *People v. Ah Kong*, 49 Cal. 6; *People v. English*, 30 Cal. 214; *People v. Stein*, 23 Cal. App. 108, 116, 137 Pac. 271 (an instruction that an irresistible impulse constitutes a defense for crime); *People v. Kosta*, 14 Cal. App. 696, 112 Pac. 907 (erroneous instruction as to accomplice).

7. See *supra*, § 410.

8. See *supra*, § 409.

9. *People v. Sternberg*, 111 Cal. 3, 6, 43 Pac. 198.

an acquittal,¹⁰ or of an instruction as to the punishments for the different crimes of which he may be convicted.¹¹ So also when a conflict in the instructions is caused by an erroneous instruction in favor of a defendant, he will not be heard to complain.¹² According to the same rule, a defendant cannot complain that the verdict is more favorable to him than the evidence warranted;¹³ or that he was convicted of a lesser offense, necessarily included in the charge, than the evidence calls for,¹⁴ provided there is some support for the verdict in the evidence.¹⁵ Likewise, the fact that the time appointed for the execution of a judgment of death is greater than that specified in the statute is not error of which a defendant can complain.¹⁶

10. *People v. Wilkison*, 30 Cal. App. 473, 158 Pac. 1067.

11. *People v. Griffith*, 146 Cal. 339, 80 Pac. 68; *People v. Dice*, 120 Cal. 189, 190, 52 Pac. 477. See *People v. Prewett*, 40 Cal. App. 416, 180 Pac. 844, holding that an instruction as to penalties was not reversible error where the jury were instructed that they were not to be influenced by the penalties in determining the guilt or innocence of the accused.

12. *People v. Harris*, 169 Cal. 53, 145 Pac. 520 (where the erroneous instruction as to insanity authorized an acquittal if a reasonable doubt as to sanity existed); *People v. Hower*, 151 Cal. 638, 644, 91 Pac. 507; *People v. Travers*, 88 Cal. 233, 239, 26 Pac. 88; *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511.

13. *People v. Coulter*, 145 Cal. 66, 78 Pac. 348; *People v. Lopez*, 21 Cal. App. 183, 131 Pac. 104; *People v. Cyty*, 11 Cal. App. 702, 106 Pac.

257; *People v. Borrego*, 7 Cal. App. 613, 95 Pac. 381.

14. *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031; *People v. Coulter*, 145 Cal. 62, 78 Pac. 348 (where the evidence showed the burglary was committed at night, and the verdict was for burglary in the second degree); *People v. Muhliner*, 115 Cal. 303, 47 Pac. 128; *People v. Lowen*, 109 Cal. 381, 42 Pac. 32; *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Barnhart*, 59 Cal. 381; *People v. Shimonaka*, 16 Cal. App. 117, 116 Pac. 327; *People v. Cyty*, 11 Cal. App. 702, 106 Pac. 257; *People v. Borrego*, 7 Cal. App. 613, 95 Pac. 381.

15. *People v. Kelley*, 24 Cal. App. 54, 62, 140 Pac. 302 (holding that involuntary manslaughter was entirely distinct from the crime of murder and voluntary manslaughter, and that a verdict therefor was under the facts entirely without foundation in the evidence).

16. *People v. Thompson*, 4 Cal. 238.

§ 563. Errors Consented to.—An appellate court will not reverse a case by reason of an alleged error in the proceedings occasioned by express consent of the defendant and his counsel, unless bound to do so by some controlling rule of law.¹⁷ Accordingly, a defendant who consented thereto cannot complain that preliminary proof necessary to the introduction of certain evidence was taken in the absence of the juror,¹⁸ that the jury took to the jury-room articles not offered in evidence,¹⁹ that the trial was continued into a Saturday afternoon (Saturday being a half-holiday),²⁰ or that the court authorized the sheriff to receive a sealed verdict during the night and allow the jury to separate until the session of the court upon the following morning.¹ So also a defendant cannot complain of the introduction or exclusion of evidence, when he consented thereto.²

§ 564. Invited Error.—It is well settled that a defendant cannot complain of errors invited by him.³ Under this rule a defendant cannot complain of a failure to bring the action to trial within sixty days after a mistrial if it was continued at his own request;⁴ or of a postponement of the time for sentence had at his own request.⁵ So also he cannot complain of evidence introduced by himself,⁶

17. *People v. Patrich*, 118 Cal. 332, 50 Pac. 425 (holding that a defendant cannot complain of an order suspending the imposition of judgment upon motion made by him); *People v. Henderson*, 28 Cal. 465; *People v. White*, 32 Cal. App. Dec. 179, 181, 190 Pac. 821 (acquiescence in an amendment of the information).

18. *People v. Evans*, 5 Cal. Unrep. 125, 41 Pac. 444.

19. *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73.

20. See *supra*, § 274.

1. *People v. Kelly*, 46 Cal. 355.

A defendant cannot consent to a

separation of the jury after they have retired for purposes of deliberation. See *supra*, § 415.

2. *People v. Ah Ton*, 52 Cal. 741; *People v. Redman*, 39 Cal. App. 566, 179 Pac. 725.

3. *People v. Witty*, 138 Cal. 576, 72 Pac. 177 (a defendant complaining of interpolations in a deposition cannot object that they were omitted in the reading).

4. *People v. Dyer*, 26 Cal. App. 429, 147 Pac. 217. See *supra*, § 279.

5. *People v. Vaughn*, 25 Cal. App. 736, 147 Pac. 116, 117.

6. *People v. Schoon*, 177 Cal. 679, 171 Pac. 680; *People v. Christian*,

or of the introduction of evidence in rebuttal of incompetent evidence introduced by himself.⁷ For like reason, an accused person cannot complain of an instruction given at his request,⁸ or of an instruction which is substantially the same as one requested by him,⁹ or of an instruction which was invited by an instruction requested by him.¹⁰ Where the only conflict in the instructions is caused by an erroneous instruction given at the request of the appellant, he has no ground of complaint.¹¹ And where he requested an instruction as to the effect of absence of motive, he cannot complain that the court gave a correla-

32 Cal. App. Dec. 950, 192 Pac. 182; *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389.

7. *People v. H. Jevne Co.*, 179 Cal. 621, 178 Pac. 517.

8. *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *People v. Bradbury*, 155 Cal. 808, 814, 103 Pac. 215; *People v. Rodley*, 131 Cal. 240, 258, 261, 63 Pac. 351; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917; *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984; *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *People v. Carroll*, 92 Cal. 568, 28 Pac. 600; *People v. Elliott*, 90 Cal. 586, 27 Pac. 433; *People v. Lopez*, 59 Cal. 362 (cited in *Dawson v. Schloss*, 93 Cal. 194, 205, 29 Pac. 31); *People v. Bradfield*, 30 Cal. App. 721, 727, 159 Pac. 443; *People v. Reynolds*, 32 Cal. App. Dec. 992, 192 Pac. 343; *People v. Wilson*, 36 Cal. App. 589, 598, 172 Pac. 1116; *People v. Martinez*, 31 Cal. App. 413, 420, 160 Pac. 868; *People v. Hoosier*, 24 Cal. App. 746, 758, 142 Pac. 514; *People v. Bartol*, 24 Cal. App. 659, 664, 142 Pac. 510; *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729; *People v. Piercy*, 16 Cal. App. 13, 116 Pac.

322; *People v. Stevens*, 15 Cal. App. 294, 297, 114 Pac. 800; *People v. Bond*, 13 Cal. App. 175, 187, 109 Pac. 150; *People v. Casselman*, 10 Cal. App. 234, 239, 101 Pac. 693; *People v. Emmons*, 7 Cal. App. 685, 698, 95 Pac. 1032; *People v. James*, 5 Cal. App. 427, 90 Pac. 561.

9. *People v. Harlan*, 133 Cal. 16, 65 Pac. 9; *People v. Card*, 40 Cal. App. 22, 180 Pac. 53; *People v. Wilson*, 23 Cal. App. 513, 523, 138 Pac. 971; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54 (where the defendant requested an instruction that the failure of the prosecution to call particular witnesses raises a presumption that their testimony would have been adverse and the court read Code Civ. Proc., § 2081, subds. 5 and 6).

10. *People v. Purio*, 33 Cal. App. Dec. 413, 194 Pac. 74.

11. *People v. Harris*, 169 Cal. 53, 145 Pac. 520; *People v. Hower*, 151 Cal. 638, 644, 91 Pac. 507 (followed in *Poor v. W. P. Fuller & Co.*, 30 Cal. App. 650, 655, 159 Pac. 233); *People v. Suesser*, 142 Cal. 354, 364, 75 Pac. 1093.

tive instruction as to the presence of motive.¹² So also when a defendant requested the giving of instructions eliminating from the consideration of the jury the question of conviction of lesser offenses, he cannot complain of the refusal of instructions relating to such lesser crimes,¹³ or of an instruction which in effect tells the jury they could not convict of a lesser offense.¹⁴ Since by requesting an instruction as to the necessity of corroboration one in effect declares a witness to be an accomplice, he cannot complain of an instruction to that effect.¹⁵ But when an instruction requested by the defendant is modified by the court it becomes the court's instruction, and if erroneous is subject to the same exception as if given without any request therefor.¹⁶

§ 565. Matters Discovered or Happening After Appeal Taken.—Since an appellate court is limited to the record on appeal, it is clear that the matters discovered pending the appeal cannot be considered, even though they point strongly to the innocence of a defendant. There is no provision of law by which newly discovered evidence may be presented to an appellate court in the first instance. The remedy in such cases rests with the executive.¹⁷ An appellate court cannot, for example, take into consideration a purported confession of another that he was the guilty party, made after the taking of the appeal.¹⁸ So also an appellate court cannot act upon evidence furnished as to the existing mental condition of a defendant and

12. *People v. Botkin*, 9 Cal. App. 244, 258, 98 Pac. 861.

13. *People v. Wright*, 167 Cal. 1, 138 Pac. 349.

14. *People v. Wilson*, 135 Cal. 331, 67 Pac. 322; *People v. Hite*, 135 Cal. 75, 67 Pac. 57.

15. *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198.

16. *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466; *People v. Wong*

Sang Lung, 3 Cal. App. 221, 84 Pac. 843.

17. *People v. Mooney*, 177 Cal. 642, 171 Pac. 690; *People v. Mooney*, 176 Cal. 105, 167 Pac. 696; *People v. Bowers*, 2 Cal. Unrep. 878, 18 Pac. 660 (approved in the *Mooney* case, *supra*).

18. *People v. Bowers*, 2 Cal. Unrep. 878, 18 Pac. 660.

upon that ground reverse a judgment otherwise legal.¹⁹ It has been held that the fact that the attorney general has consented to the reversal of the judgment is immaterial, as he has no power to confer upon an appellate court power denied it by the constitution.²⁰

· § 566. **Grounds for Decision.**—It is a general rule that a ruling sustaining an objection to offered evidence will be upheld if sustainable on any ground, regardless of the objection made by the respondent.¹ If for any reason the ruling was proper, the appellant cannot complain because deprived of improper or illegal evidence, or evidence that could not affect the verdict or prejudice his case.² It has been held, however, that it is error to sustain a general objection of the prosecuting attorney, if the objection could have been obviated, if its particular character had been pointed out, as, for example, where the evidence was objectionable only because a sufficient predicate had not been laid therefor.³ Applying the rule above stated, it has been held that the reasons assigned by a trial judge for refusing an instruction are immaterial and its action will be upheld if sustainable for any reason.⁴ And when a motion for a new trial is made upon several grounds, and the order granting it is general in terms, the court upon appeal will review the entire record upon which the order was based, and affirm it if justified upon any ground, regardless of the grounds specified by the trial court.⁵ If one of the grounds for a new trial was the

19. *People v. Schmitt*, 106 Cal. 48, 55, 39 Pac. 204; *People v. Moice*, 15 Cal. 329.

20. *People v. Mooney*, 176 Cal. 105, 167 Pac. 696 (same case, 175 Cal. 666, 166 Pac. 999).

1. *People v. Ellsworth*, 127 Cal. 595, 60 Pac. 161; *People v. Graham*, 21 Cal. 261; *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382; *People v. Hogan*, 11 Cal. App. 599, 105

Pac. 938; *People v. Hutchings*, 8 Cal. App. 551, 97 Pac. 325.

2. *People v. Hutchings*, 8 Cal. App. 551, 97 Pac. 325.

3. *People v. Hart*, 153 Cal. 261, 94 Pac. 1042.

4. *People v. Keith*, 141 Cal. 686, 75 Pac. 304.

5. *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *People v. Flood*, 102 Cal. 330, 36 Pac. 663; *People v.*

insufficiency of the evidence to sustain the verdict, it may be presumed that the order was based upon that ground, unless by direct language it excludes this as a ground for the action of the trial court.⁶ The statutory rule in civil actions that it will be presumed that the order was not granted on the ground of the insufficiency of the evidence to sustain the verdict, if the order does not so specify,⁷ has no application to criminal trials as there is nothing in the Penal Code making it applicable.⁸

§ 567. Subsequent Appeals and Law of Case.—A ruling by the appellate court upon a point distinctly made upon a previous appeal is in all subsequent proceedings in the same case a final adjudication from the consequences of which the court cannot depart, nor the parties relieve themselves.⁹ Its ruling becomes the law of the case, and the point disposed of cannot be again reviewed upon a subsequent appeal in the same case.¹⁰ An appellate court has no lawful power to review its judgments which have become final at the expiration of the constitutional period of thirty days.¹¹ The judgment of the appellate court, however, is the law of the case only as to matters deter-

Lum Yit, 83 Cal. 130, 23 Pac. 228; *People v. Baker*, 39 Cal. 686. See *APPEAL AND ERROR*, vol. 2, p. 813, for same rule in civil appeals.

6. *People v. Flood*, 102 Cal. 330, 36 Pac. 663 (citing with approval, *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481); *People v. Dewar*, 33 Cal. App. Dec. 150, 193 Pac. 156.

7. See *APPEAL AND ERROR*, vol. 2, pp. 815, 816.

8. *People v. Dewar*, 33 Cal. App. Dec. 150, 193 Pac. 156.

9. *People v. Hatch*, 163 Cal. 368, 372, 125 Pac. 907; *People v. Thompson*, 115 Cal. 160, 46 Pac. 912 (per *Harrison, J.*, concurring); *People v.*

Hamilton, 103 Cal. 488, 496, 37 Pac. 627; *People v. Bennett*, 5 Cal. Unrep. 824, 50 Pac. 703; *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861; *Huntington v. Superior Court*, 5 Cal. App. 288, 295, 90 Pac. 141.

10. *People v. Colby*, 54 Cal. 184; *People v. Bennett*, 5 Cal. Unrep. 824, 50 Pac. 703 (holding that upon appeal from a judgment rendered pursuant to a mandate of the appellate court, the decision upon the first appeal is the law of the case); *People v. Hurtado*, 2 Cal. Unrep. 206.

11. *People v. Bennett*, 5 Cal. Unrep. 824, 50 Pac. 703.

mined upon the former appeal.¹² It is not *res judicata* as to new points presented on the second appeal, or to questions of fact.¹³ In case of separate appeals from judgments and orders denying a new trial, formerly allowed, the determination of the appeal from the judgment is not the law of the case as to questions raised upon the latter appeal, which might have been but were not determined upon the former appeal.¹⁴

Presumptions.

§ 568. General Rule.—It is an established rule on appeal in criminal cases as in civil actions that all inferences and presumptions not contradicted by or inconsistent with the record are in favor of the regularity of the proceedings in courts of general jurisdiction. Error will not be presumed, and so it is incumbent upon the appellant to produce a record affirmatively showing the alleged errors.¹⁵

12. *People v. Thompson*, 115 Cal. 160, 46 Pac. 912; *People v. Hamilton*, 103 Cal. 488, 496, 37 Pac. 627.

13. *People v. Hamilton*, 103 Cal. 488, 496, 37 Pac. 624.

14. *People v. Thompson*, 115 Cal. 160, 46 Pac. 912.

15. *People v. Russell*, 156 Cal. 450, 457, 105 Pac. 416; *People v. Allen*, 144 Cal. 298, 77 Pac. 948; *People v. McDaniels*, 141 Cal. 113, 74 Pac. 773; *People v. Morton*, 139 Cal. 719, 728, 73 Pac. 609; *People v. Brennan*, 121 Cal. 495, 53 Pac. 1098; *People v. Holmes*, 118 Cal. 444, 449, 50 Pac. 675; *People v. McCarthy*, 115 Cal. 255, 262, 46 Pac. 1073; *People v. Gibson*, 106 Cal. 458, 472, 39 Pac. 864; *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v. Gillis*, 97 Cal. 542, 32 Pac. 586; *People v. Johnson*, 88 Cal.

171, 25 Pac. 1116; *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95 (presumption as to transfer of cause from one department to another); *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678; *People v. Huff*, 72 Cal. 117, 13 Pac. 168; *People v. Marks*, 72 Cal. 46, 13 Pac. 149; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. Hope*, 62 Cal. 291; *People v. Colson*, 49 Cal. 679 (presuming an order refusing to allow a defendant further time to move for a new trial was correct); *People v. Williams*, 45 Cal. 25; *People v. Haun*, 44 Cal. 96 (presuming that the court exercised its discretion wisely when it required the defendant to open and allowed the prosecution to close the argument); *People v. McAuslan*, 43 Cal. 55; *People v. Winters*, 29 Cal. 658; *People v. Jocelyn*, 29 Cal.

There is a limitation to this rule in those cases in which the statute definitely prescribes what the minutes of the proceedings shall contain. In the absence of any showing to the contrary, it must be presumed that the minutes of the clerk were correctly kept, and an appellate court cannot indulge the presumption that proceedings occurred at the trial which ought to have been, but were not, entered in the minutes. Thus, where the minutes are silent as to whether a plea was entered, it will be presumed on appeal that the defendant did not plead.¹⁶ But as to matters not required by law to be entered upon the minutes, it will be presumed in the absence of anything in the record to the contrary that the law was complied with.¹⁷ Where, for example, the minutes and the record are silent as to a compliance with section 1066 of the Penal Code, requiring the court to inform a defendant as to his right to challenge jurors, it will be presumed the statute was complied with.¹⁸

§ 569. Application of Rule Generally.—In the earlier decisions it was the rule that in criminal cases, particularly

562; *People v. Blackwell*, 27 Cal. 66 (holding that the county courts, under the former practice, were courts of general criminal jurisdiction within the meaning of the rule); *People v. Hobson*, 17 Cal. 424 (holding that the rule applied to the former court of sessions); *People v. Robinson*, 17 Cal. 363 (holding that the former district courts were courts of general jurisdiction); *People v. Connor*, 17 Cal. 354; *People v. Stennett*, 34 Cal. App. Dec. 501, 783, 197 Pac. 372; *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442; *People v. Malone*, 32 Cal. App. Dec. 729, 191 Pac. 1113 (presuming, as against an objection that defendant's counsel had no opportunity to familiarize him-

self with the case, that the defendant's rights were safeguarded); *People v. Airola*, 31 Cal. App. Dec. 421, 188 Pac. 817; *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935; *People v. Hatch*, 13 Cal. App. 521, 527, 109 Pac. 1097 (presumption under former subdivision 4 of section 995 of the Penal Code); *People v. Beatty*, 4 Cal. App. 409, 88 Pac. 377. See *supra*, § 542 et seq. See *APPEAL AND ERROR*, vol. 2, p. 852, for the rule in civil appeals.

16. *People v. Gaines*, 52 Cal. 479.

17. *People v. Russell*, 156 Cal. 450, 105 Pac. 416.

18. *People v. Russell*, 156 Cal. 450, 457, 105 Pac. 416 (overruling *People v. Moore*, 103 Cal. 508, 37 Pac. 510).

those amounting to a felony, nothing was presumed against the criminal, and he was not to be considered as having waived any right unless the waiver should affirmatively appear.¹⁹ The modern rule, however, seems to be otherwise. If the record does not show that the defendant objected to an error or irregularity in the proceedings it will be presumed on appeal that he consented thereto. This rule has been applied where there was a change in the personnel of the court during the trial of a case,²⁰ where a case was set for trial beyond the sixty-day limit,¹ or was continued beyond such limit,² and where the trial court made an order excluding the public from the trial.³ So also in the absence of anything in the record to the contrary, it will be presumed in favor of a judgment upon a second trial after a discharge of the jury on a prior trial, that the defendant consented to the discharge so that there was no jeopardy.⁴ Likewise, if the record does not show the contrary, it will be presumed in favor of a judgment of conviction that the defendant was over fourteen years of age at the time of the commission of the offense.⁵ And if a defendant who was adjudged insane is afterwards put upon trial, it will be presumed that the superintendent of the state hospital and the sheriff pursued the course prescribed by the code as to such defendant, the record being silent with reference thereto.⁶ Pursuant to the same rule, in the absence of the evidence and the proceedings, it will be presumed that a remark of the judge that he never had a doubt as to the defendant's san-

19. *People v. O'Hara*, 1 Cal. Unrep. 71; *People v. March*, 1 Cal. Unrep. 6.

20. *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693.

1. *People v. Rongo*, 169 Cal. 71, 145 Pac. 1017.

2. *People v. Bell*, 4 Cal. Unrep. 522, 36 Pac. 94; *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v.*

Peter, 20 Cal. App. 151, 128 Pac. 415.

3. *People v. Swafford*, 65 Cal. 223, 3 Pac. 809.

4. *People v. Curtis*, 76 Cal. 57, 17 Pac. 941; *People v. Disperati*, 11 Cal. App. 469, 105 Pac. 617.

5. *People v. Richmond*, 29 Cal. 414.

6. *People v. Farrell*, 31 Cal. 576, 581.

ity was made in response to a suggestion of the present sanity of the defendant.⁷

§ 570. Preliminary Examination.—When a defendant is committed after a preliminary examination, it will be presumed, in the absence of any showing to the contrary, that he was legally examined and committed by a magistrate;⁸ that the complaining witness deposed from personal knowledge when the complaint so shows upon its face,⁹ that the court properly informed the defendant of his right to the aid of counsel;¹⁰ that the stenographer acting at the preliminary examination was regularly appointed;¹¹ and that a proper warrant of commitment was made out and delivered to the proper officer.¹² When the order of commitment and the information are filed on the same day, it will be presumed that the order was first filed, there being no showing to the contrary.¹³ And it will be presumed in favor of a ruling admitting it in evidence, nothing to the contrary appearing in the record, that a deposition taken at the preliminary examination was properly transcribed,¹⁴ and certified,¹⁵ that the transcript was filed within the statutory time,¹⁶ that the original notes of the reporter were filed,¹⁷ and that the reporter was sworn, when necessary.¹⁸

7. *People v. Findley*, 132 Cal. 301, 64 Pac. 472.

8. *People v. Jackson*, 138 Cal. 462, 71 Pac. 566; *People v. Williams*, 84 Cal. 616, 24 Pac. 145.

9. *People v. Coombs*, 9 Cal. App. 262, 98 Pac. 686.

10. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202.

11. *People v. Warner*, 147 Cal. 546, 82 Pac. 196.

12. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

13. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

14. *People v. Reilly*, 106 Cal. 648, 40 Pac. 13.

15. *People v. Moran*, 144 Cal. 48, 61, 77 Pac. 777; *People v. Buckley*, 143 Cal. 375, 382, 77 Pac. 169; *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. Reilly*, 106 Cal. 648, 40 Pac. 13; *People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *People v. Davis*, 4 Cal. Unrep. 524, 36 Pac. 96; *People v. Beretoni*, 22 Cal. App. 426, 134 Pac. 790.

16. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

17. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

18. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

§ 571. **Indictment or Information, Arraignment and Plea.**—In the absence of anything in the record to the contrary, it will be presumed in support of a judgment, that an indictment was properly presented,¹⁹ by a properly organized grand jury,²⁰ that the information was founded upon the commitment as made by the magistrate;¹ and that the action of the court in denying a motion to dismiss an information was regular.² Where the proceedings on a dismissal of a former information are not in the record, it will be presumed that the order complied with the requirements of the code.³ And if an information was dismissed for the purpose of filing an amended information, it will be presumed that the new information is what it purports to be in the absence of any affirmative showing that it was based on a second examination.⁴ A defendant is presumed to have been present when his plea was entered, the record being silent in respect thereto.⁵ And where the record does not show by whom the question was asked as to whether he pleads guilty or not guilty to the indictment or information, the presumption is that official duty was performed.⁶

19. *People v. Blackwell*, 27 Cal. 66 (where it was presumed that the indictment was presented by the foreman of the grand jury).

20. *People v. Millsaps*, 35 Cal. 47, citing *People v. Hidden*, 32 Cal. 445 and holding that it will be presumed that the court did not excuse persons summoned as grand jurors without legal cause, there being no showing in the record to the contrary).

1. *People v. Gordon*, 13 Cal. App. 678, 110 Pac. 469.

2. *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586; *People v. Beach*, 122 Cal. 37, 54 Pac. 369.

3. *People v. Saenz*, 33 Cal. App. Dec. 805, 195 Pac. 442.

4. *People v. Luck Sing*, 32 Cal. App. 91, 162 Pac. 137.

5. *People v. Cline*, 83 Cal. 374, 23 Pac. 391.

6. *People v. Airola*, 31 Cal. App. Dec. 421, 188 Pac. 817.

Where the record shows that the defendant pleaded guilty "in response to the court," it will be presumed the plea was in response to the question whether he was guilty or not guilty; *People v. Miller*, 137 Cal. 642, 70 Pac. 735.

§ 572. **Trial.**—The rule of presumptions is applicable to the proceedings on the trial. Hence, if the record does not show the contrary, it will be presumed that a motion for a change of venue was properly refused;⁷ that the clerk read the indictment or information to the jury;⁸ omitting the portion relating to prior convictions if the defendant confessed the same;⁹ that the proceedings relating to a view by the jury were regular;¹⁰ that rulings admitting or excluding evidence were proper;¹¹ that the evidence was sufficient to justify the verdict;¹² and that an order refusing a defendant the right to impeach one of his witnesses by contradictory statements was proper.¹³ Where the evidence upon which a court sustains an objection to the competency of a witness is not in the record, it will be presumed that the court was satisfied of the witness' incompetency.¹⁴

Presence of defendant.—If the record does not show otherwise, it will be presumed that the defendant was present when his case was set for trial;¹⁵ that he was

7. When it is claimed that there was a prejudice against the defendant in the community, and the proceedings in connection with the impanelment of the jury are not in the record, it must be assumed that the defendant was tried by unprejudiced and fair-minded jurors satisfactory to himself. *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46.

8. *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95.

9. *People v. McGregor*, 88 Cal. 140, 26 Pac. 97 (holding that the presumption is not overcome by a recital in the record that "the information charging the defendant with the above crime—not 'crimes'—was read and plea—not 'pleas'—of not guilty stated to the jury");

People v. Howard, 39 Cal. App. 217, 178 Pac. 865.

10. *People v. Huff*, 72 Cal. 117, 13 Pac. 168 (presuming that the sheriff or his deputy accompanied the jury, that the place to be viewed was shown to the jury by a person appointed by the court for that purpose, and that, if need be, the counsel and judge were present).

11. *People v. Tyren*, 179 Cal. 575, 178 Pac. 132; *People v. Lowrie*, 4 Cal. App. 137, 87 Pac. 253.

12. See *supra*, § 543.

13. *People v. Reynolds*, 32 Cal. App. Dec. 992, 192 Pac. 343.

14. *People v. Marseiler*, 70 Cal. 98, 11 Pac. 503.

15. *People v. Rader*, 136 Cal. 253, 68 Pac. 707; *People v. Collins*, 105 Cal. 504, 39 Pac. 16.

present during the trial, if for a felony;¹⁶ and that he was present at the rendition of the verdict.¹⁷ If the presence of the defendant is necessary when a special venire is ordered, his presence will be presumed if the record is silent with reference thereto.¹⁸ And if the record does not show the circumstances of the momentary absence of the defendant from the trial, it will be presumed that the circumstances were such that a momentary absence was not error.¹⁹

Misconduct of counsel.—If there is no showing in the record by which it may be determined that the district attorney was acting in bad faith, it will be presumed that he was conscientiously discharging his duty, as he understood it.²⁰ When the record does not contain all the evidence, it must be presumed that the evidence was such as to authorize questions asked by the district attorney, if admissible at all under any state of the case.¹ And if the instructions are not in the record, and the misconduct of the district attorney is such that it is curable by an instruction of the court, it will be presumed that the court instructed the jury to disregard it.²

§ 573. Instructions.—The rule of presumptions is applicable to instructions.³ If the action of the court in grant-

16. *People v. Collins*, 105 Cal. 504, 39 Pac. 16; *People v. Stuart*, 4 Cal. 218, 226; *People v. Boreo*, 13 Cal. App. 686, 110 Pac. 525.

17. *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; *People v. Stuart*, 4 Cal. 218, 226.

18. *People v. Stennett*, 34 Cal. App. Dec. 501, 783, 197 Pac. 372, 384 (in opinion denying a rehearing).

19. *People v. Bealoba*, 17 Cal. 389, 400 (on rehearing).

20. *People v. Ciulla*, 44 Cal. App. 719, 187 Pac. 46.

1. *People v. Butler*, 8 Cal. 435.

2. *People v. Molina*, 128 Cal. 505, 59 Pac. 34.

3. *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073 (holding that an instruction that the defendant was to be considered sane for the purpose of the trial will be presumed to have been given to correct an erroneous suggestion of counsel in argument); *People v. Gonzales*, 6 Cal. Unrep. 263, 56 Pac. 804 (where the court introduced an instruction with a statement that a certain contention was made, in the absence of

ing or refusing requests for instructions is erroneous, this must be shown by the appellant.⁴ If the instructions are not in the record it will be presumed that the court correctly instructed the jury,⁵ but that the instructions were lost, misplaced or abstracted.⁶ If the record does not show at whose requests instructions were given, it will be presumed that the appellant requested them.⁷ And in like manner, any uncertainty in the record as to whether an instruction was given must be resolved in favor of supporting the judgment.⁸ In the absence of the evidence, it will be presumed in favor of the action of the court in refusing an instruction that no evidence was introduced to which it was applicable,⁹ and in favor of instructions given, that they were pertinent to the issue.¹⁰ So also where the evidence is not in the record, it will be presumed that a fact assumed by the court was an admitted or uncontroverted fact in the case.¹¹ When it is objected that a particular instruction is not sufficiently full, and the other instructions are not in the record, it must be presumed the instructions when read together were correct.¹² So also, if the record does not show the contrary, it will

anything in the record to the contrary, it must be presumed that the contention was made as stated); *People v. Jones*, 1 Cal. Unrep. 545 (presuming, under the former practice, that the court stated to the jury that it refused certain instructions because covered by others).

4. *People v. Robinson*, 17 Cal. 363.

5. *People v. Molina*, 126 Cal. 505, 59 Pac. 34.

6. *People v. Connor*, 17 Cal. 354.

7. *People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63. See *supra*, § 544.

8. *People v. McInerney*, 30 Cal. App. 283, 158 Pac. 128.

9. *People v. Allen*, 144 Cal. 298,

77 Pac. 948; *People v. Clark*, 121 Cal. 633, 54 Pac. 147; *People v. Gilbert*, 60 Cal. 108; *People v. Whitney*, 53 Cal. 420; *People v. Best*, 39 Cal. 690; *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935; *People v. Howland*, 13 Cal. App. 364, 109 Pac. 894. See *supra*, § 544.

10. *People v. Allen*, 144 Cal. 298, 77 Pac. 948; *People v. Strong*, 46 Cal. 302; *People v. Dick*, 32 Cal. 213; *People v. Barry*, 31 Cal. 357; *People v. Quincy*, 8 Cal. 89; *People v. Johnson*, 2 Cal. Unrep. 573, 8 Pac. 690.

11. *People v. Messersmith*, 61 Cal. 246. See *supra*, § 351.

12. *People v. Russo*, 8 Cal. App. 636, 97 Pac. 700.

be presumed that the instructions were in writing, or that any oral charge was properly consented to and taken down by the reporter.¹³

§ 574. Jury and Verdict.—If the record does not show the contrary, it will be presumed that the trial judge acted properly in directing a new panel to be summoned;¹⁴ that the jurors were duly sworn;¹⁵ that they were qualified to act;¹⁶ that the court admonished the jurors at each adjournment;¹⁷ and that the verdict was properly rendered.¹⁸ It is a presumption of law that the jury exercised its jurisdiction soundly,¹⁹ and that they heeded the instructions of the court.²⁰ It will not, however, be presumed in favor

13. *People v. Ludwig*, 118 Cal. 328, 50 Pac. 426; *People v. Barton*, 88 Cal. 176, 25 Pac. 1117; *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116; *People v. McGregor*, 88 Cal. 140, 26 Pac. 97; *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95; *People v. Bourke*, 66 Cal. 455, 6 Pac. 89; *People v. Ferris*, 56 Cal. 442; *People v. Bumberger*, 45 Cal. 650 (presumption as to consent); *People v. Wright*, 45 Cal. 260; *People v. Shuler*, 28 Cal. 490; *People v. Garcia*, 25 Cal. 531; *People v. Chung Lit*, 17 Cal. 320; *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389. But see *People v. O'Hara*, 1 Cal. Unrep. 71, holding that the record must show the waiver of the statutory right, and if it does not show that the defendant consented to the giving of oral instructions, the judgment must be reversed.

14. *People v. Wise*, 1 Cal. Unrep. 33; *People v. Stennett*, 34 Cal. App. Dec. 501, 783, 197 Pac. 372.

15. *People v. Darr*, 61 Cal. 554.

16. *People v. Brotherton*, 47 Cal. 388; *People v. Gilmore*, 17 Cal. App. 737, 121 Pac. 697.

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17. *People v. Yee Foo*, 4 Cal. App. 730, 89 Pac. 450. But see *People v. Maughs*, 149 Cal. 253, 86 Pac. 187, where the court states that the record should disclose that the court admonished the jury upon recesses in adjournment. As pointed out in the *Yee Foo* case, however, no authority was cited for this statement.

18. *People v. Sykes*, 10 Cal. App. 67, 101 Pac. 20 (presuming that the verdict was read to the jury after its return into court).

19. *People v. Rogers*, 71 Cal. 565, 12 Pac. 679.

It must be presumed that the jury gave evidence tending to rebut intent its proper weight in arriving at their verdict. *People v. Owens*, 3 Cal. App. 750, 86 Pac. 980.

Where the fact that a juror was asleep is shown, but not the duration thereof, it cannot be presumed that he was asleep for such a length of time as to have prevented his understanding the testimony being given. *People v. Roselle*, 20 Cal. App. 420, 129 Pac. 477.

20. *People v. Dong Pak Yip*, 164 Cal. 143, 147, 127 Pac. 1031; *People*

of a verdict failing to find upon a plea of former conviction or acquittal that the plea was withdrawn or waived even though the evidence is not before the appellate court.¹

§ 575. New Trial, Judgment and Execution.—The rule of presumptions is applicable to orders upon motion for a new trial.² Hence, where a motion for a new trial has been passed upon by a judge other than the one who heard the case, and there is nothing in the record to the contrary, it will be presumed that a sufficient reason existed for the change.³ The mere fact that the trial court had some doubt as to whether a verdict of guilty should have been returned will not justify it in granting a new trial, if the doubt is not sufficient to give rise to an unequivocal opinion that the verdict was not justified. And if the court denied a new trial it must be assumed on appeal that the doubt was not such as to warrant setting aside the verdict.⁴

Judgment and execution.—In the absence of any showing in the record to the contrary, it will be presumed that a postponement of the time for pronouncing judgment was regular;⁵ that the defendant was properly arraigned for judgment and informed of the charge against him;⁶ and

v. Durrant, 116 Cal. 179, 207, 48 Pac. 75; *People v. Lathrop*, 32 Cal. App. Dec. 1107, 192 Pac. 722; *People v. Christian*, 32 Cal. App. Dec. 950, 192 Pac. 182; *People v. Prewett*, 40 Cal. App. 416, 180 Pac. 844; *People v. Peeples*, 32 Cal. App. 279, 162 Pac. 653; *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420; *People v. White*, 5 Cal. App. 329, 90 Pac. 471. See *infra*, § 603.

1. *People v. Tucker*, 115 Cal. 337, 47 Pac. 111; *People v. Fuqua*, 61 Cal. 377.

2. *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058; *People v.*

Voll, 43 Cal. 166 (holding that in the absence of the evidence, the presumptions are in favor of an order denying a new trial on the ground of newly discovered evidence).

3. *People v. Hobson*, 17 Cal. 424.

4. *People v. Bonzani*, 24 Cal. App. 549, 562, 141 Pac. 1062; *People v. Brecker*, 20 Cal. App. 205, 209, 127 Pac. 666.

5. *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935; *People v. Scott*, 13 Cal. App. 301, 109 Pac. 498.

6. *People v. Barton*, 88 Cal. 176, 25 Pac. 1117; *People v. Wademan*,

that he was present at the making of an order for his execution as provided in section 1227 of the Penal Code.⁷ Where charges of prior conviction are withdrawn before judgment, and the penalty imposed is such as might have been inflicted if such conviction had not been charged, it must be presumed upon appeal that the court paid no attention to such convictions in pronouncing judgment.⁸

Discretion of Trial Court.

§ 576. In General.—It is a well-established rule of appellate practice that, while the exercise of a discretionary power may be reviewed upon appeal, the action of a trial court will not be disturbed except for an abuse of discretion. It is presumed that the discretion of the court was properly exercised, and the burden is upon the appellant to show an abuse thereof.⁹ The mere fact that the appellate court, if at nisi prius, would have ruled the other way is not the test by which to determine whether the action of the trial court should be reversed.¹⁰

The following matters are within the discretion of the trial court, and its action will not be disturbed unless an abuse of discretion appears; the continuance of the preliminary examination,¹¹ or trial,¹² the withdrawal of plea of not guilty to enable the defendant to demur or move to set aside the indictment or information;¹³ the propriety

38 Cal. App. 116, 137, 175 Pac. 791.

7. *People v. Sing Lum*, 61 Cal. 538.

8. *People v. Flynn*, 73 Cal. 511, 517, 15 Pac. 102.

9. *People v. Sampo*, 17 Cal. App. 135, 151, 118 Pac. 957.

10. *People v. Goldsworthy*, 130 Cal. 600, 62 Pac. 1074; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204.

11. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670.

12. At common law, applications for continuances in criminal case were addressed to the sound discretion of the court and the refusal could not be assigned as error. This rule has been modified by our statutes, which authorize a review of such orders on appeal. *People v. Diaz*, 6 Cal. 248. But under the existing California practice the action of the trial court will not be disturbed except in a plain case of abuse of discretion. See *supra*, § 289.

13. See *supra*, § 135.

of granting a change of venue;¹⁴ decisions of fact as to the qualifications of jurors;¹⁵ matters pertaining to the submission to a jury of the question of the present sanity of a defendant;¹⁶ the order of proof;¹⁷ the allowance of leading questions;¹⁸ the scope of cross-examination of a witness;¹⁹ the sufficiency of proof of diligence to find a witness so as to authorize the admission of his deposition in evidence;²⁰ the propriety of excluding witnesses from the courtroom;¹ the granting or refusing a view of the scene of the crime;² and the regulation of argument of counsel.³ Prior to the enactment of the indeterminate sentence law,⁴ it was the rule that the discretion of the trial court as to the extent of punishment within the statutory limits was not subject to review upon appeal.⁵

§ 577. Competency of Witnesses and Interpreters.—

When the question as to the competency of a witness is addressed to the discretion of the trial court, as in the case of children, its determination of the question will not be interfered with in the absence of an abuse of discretion.⁶ The ruling of the trial court will not be held erro-

14. See *supra*, § 66.

15. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670. See *infra*, § 587.

16. *People v. Keyes*, 178 Cal. 794, 802, 175 Pac. 6; *People v. West*, 25 Cal. App. 369, 143 Pac. 793 (holding that the discretion of the trial court was abused).

17. *People v. Goldworthy*, 130 Cal. 601, 62 Pac. 1074; *People v. Whitlow*, 24 Cal. App. 1, 6, 139 Pac. 826. See *supra*, § 301.

18. *People v. Brown*, 130 Cal. 591, 62 Pac. 1072. See WITNESSES.

19. *People v. Conness*, 150 Cal. 114, 88 Pac. 821. See WITNESSES.

20. See *supra*, § 217.

1. See *supra*, § 295.

2. See *supra*, § 311.

3. *People v. Owens*, 132 Cal. 469, 64 Pac. 770. See *supra*, § 325.

4. See *supra*, § 485.

5. *People v. Schafer*, 161 Cal. 573, 580, 119 Pac. 920; *People v. Huff*, 72 Cal. 117, 13 Pac. 168; *People v. Clary*, 72 Cal. 59, 13 Pac. 77; *People v. Deatrick*, 30 Cal. App. 507, 159 Pac. 175.

6. *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720 (competency of "intimate acquaintance"); *People v. Stouter*, 142 Cal. 146, 75 Pac. 780; *People v. Manogian*, 141 Cal. 592, 75 Pac. 117 ("intimate acquaintance"); *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838;

neous upon a mere difference of opinion.⁷ In this connection it has been held that the fact that the testimony of a child differs from that of other witnesses is not even prima facie evidence of his incapacity, for such difference is frequently found in the testimony of adult witnesses.⁸ It is an open question whether the question as to the competency of an interpreter is reviewable upon appeal.⁹

§ 578. New Trial.—The discretion vested in a trial court to grant or refuse a new trial is presumed to have been lawfully exercised, and its action will not be disturbed upon appeal save for an abuse of discretion.¹⁰ This is particularly true where a new trial is granted.¹¹ There

People v. Swist, 136 Cal. 529, 69 Pac. 223; People v. Daily, 135 Cal. 104, 67 Pac. 16 (determination of competency of nine year old boy); People v. Baldwin, 117 Cal. 244, 49 Pac. 186; People v. Craig, 111 Cal. 460, 469, 44 Pac. 186; People v. Pico, 62 Cal. 50; People v. Bernal, 10 Cal. 66; People v. Delaney, 35 Cal. App. Dec. 273, 199 Pac. 896 (discretion as to competency of a four year old boy); People v. Lopez, 34 Cal. App. Dec. 562, 197 Pac. 144; People v. Thourwald, 31 Cal. App. Dec. 570, 189 Pac. 124; People v. Lopez, 33 Cal. App. 530, 165 Pac. 722; People v. Harden, 24 Cal. App. 522, 141 Pac. 1075; People v. Tyree, 21 Cal. App. 701, 132 Pac. 784; People v. Harrison, 18 Cal. App. 288, 123 Pac. 200; People v. Gregory, 8 Cal. App. 738, 97 Pac. 912; People v. Collins, 5 Cal. App. 654, 91 Pac. 158; People v. Fernandez, 4 Cal. App. 318, 325, 87 Pac. 1112; People v. Bradford, 1 Cal. App. 41, 81 Pac. 712. See WITNESSES. See supra, § 236, as to discretion in determining whether a witness to the insanity of a de-

fendant is an "intimate acquaintance"; and see supra, § 240, as to discretion in determining the qualification of expert witnesses.

7. People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

8. People v. Swist, 136 Cal. 520, 69 Pac. 223; People v. Craig, 111 Cal. 460, 469, 44 Pac. 186.

9. People v. Sing Yow, 145 Cal. 1, 8, 78 Pac. 235.

10. People v. Oxnam, 170 Cal. 211, 149 Pac. 165; People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; People v. Foster, 32 Cal. App. Dec. 865, 192 Pac. 142; People v. Kawasaki, 23 Cal. App. 92, 137 Pac. 287. See supra, § 463.

11. People v. Chew Wing Gow, 120 Cal. 298, 52 Pac. 657; People v. Knutte, 111 Cal. 453, 44 Pac. 166; People v. Flood, 102 Cal. 330, 36 Pac. 663; People v. Brooks, 90 Cal. 174, 27 Pac. 72 (holding that an order granting a new trial on the ground the verdict is not sustained by the evidence will not be reversed unless the record clearly shows that there was no evidence in conflict with that upon which

is a strong presumption that the trial court exercised its discretion properly,¹² and with a full appreciation of its duties and obligations under section 4½ of article VI of the constitution.¹³ Consequently, a very clear case is required to be made out to justify an interference with an order granting a new trial. Indeed, it has been said by the supreme court: "We can hardly manufacture in fancy a hypothetical case in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge."¹⁴

Questions of Law and Fact.

§ 579. In General.—Under the constitution the jurisdiction of the appellate courts in criminal cases is limited to the review of "questions of law alone."¹⁵ Accordingly, while such courts have power to review the testimony in criminal cases to determine whether it sustains a

the verdict rested); *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Baker*, 39 Cal. 686; *People v. Fugitt*, 5 Cal. Unrep. 496, 46 Pac. 379 (holding that the order will not be disturbed where the evidence is substantially conflicting).

12. *People v. Knutte*, 111 Cal. 453, 44 Pac. 166.

13. *People v. Canfield*, 173 Cal. 309, 159 Pac. 1046.

14. *People v. Canfield*, 173 Cal. 309, 312, 159 Pac. 1046 (quoted in *People v. Dewar*, 33 Cal. App. Dec. 150, 193 Pac. 156). Compare *People v. Tomskey*, 20 Cal. App. 672, 681, 130 Pac. 184, reversing an order granting a new trial on the ground that the defendant failed to plead and where the case was tried as though a plea was regularly entered, and the evidence showed the de-

fendant to be guilty. In this case the district court of appeal said that if a trial court should set aside a verdict or grant a new trial in contravention of the mandate of the constitution, its action will be nullified upon appeal as readily as the appellate court would refuse to reverse a judgment or order denying a new trial when of the opinion that the error complained of has not resulted in a miscarriage of justice.

15. Const., art. VI, § 4; *People v. Moore*, 155 Cal. 237, 100 Pac. 688; *People v. Wells*, 145 Cal. 138, 78 Pac. 470; *People v. Hough*, 120 Cal. 538, 65 Am. St. Rep. 201, 52 Pac. 846; *People v. Wymer*, 35 Cal. App. Dec. 420, 199 Pac. 815; *People v. Lichtenstein*, 22 Cal. App. 592, 605, 135 Pac. 692.

verdict,¹⁶ it cannot disturb a verdict on this ground unless it can say, as a matter of law, that the verdict is without the necessary evidentiary support.¹⁷ This rule has not been changed by section 41½ of article VI of the constitution adopted in 1910.¹⁸ It is not the province of an appellate court to pass upon the credibility of witnesses in support of a verdict, or to determine the weight to be accorded their testimony. These matters are within the province of the jury, and their decision is final and not subject to review by courts of appeal,¹⁹ unless the testi-

16. *People v. Jones*, 31 Cal. 565 (per Sanderson, J., and Currey, C. J.); *People v. Dodge*, 30 Cal. 448 (quaere); *People v. Jones*, 1 Cal. Unrep. 544 (not deciding the question).

17. *People v. Niino*, 183 Cal. 126, 190 Pac. 626; *People v. Willard*, 150 Cal. 548, 89 Pac. 124; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101; *People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *People v. Manning*, 48 Cal. 335; *People v. Jones*, 31 Cal. 565, 575 (per Sanderson, J., concurring); *People v. Newsome*, 34 Cal. App. Dec. 273, 195 Pac. 938; *People v. Haydon*, 18 Cal. App. 543, 554, 123 Pac. 1102, 1114; *People v. Knapp*, 16 Cal. App. 682, 117 Pac. 792; *People v. Saunders*, 13 Cal. App. 743, 110 Pac. 825.

18. *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874; *People v. Slaughter*, 33 Cal. App. 365, 383, 165 Pac. 44; *People v. Haydon*, 18 Cal. App. 543, 554, 123 Pac. 1102, 1114. See *People v. Lichtenstein*, 22 Cal. App. 592, 605, 135 Pac. 692 (quaere).

19. *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. O'Brien*, 130 Cal. 1, 5, 62 Pac. 297; *People v. Lewis*, 124 Cal. 551, 45 L. R. A.

783, 57 Pac. 470; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Cummings*, 123 Cal. 269, 55 Pac. 898; *People v. Durrant*, 116 Cal. 179, 200, 48 Pac. 75, 79 (arguments touching the credibility of witnesses and the weight to be given their testimony are not proper in the appellate courts); *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Anthony*, 56 Cal. 397 (the mere fact that the prosecuting witness took a great interest in the prosecution does not warrant a holding that the verdict was contrary to the evidence); *People v. Ah Ti*, 9 Cal. 16; *People v. Mazzurco*, 33 Cal. App. Dec. 153, 193 Pac. 165; *People v. Franklin*, 31 Cal. App. Dec. 386, 188 Pac. 607; *People v. Young*, 44 Cal. App. 279, 186 Pac. 383 (contributing to delinquency of female minor); *People v. Vickroy*, 41 Cal. App. 275, 182 Pac. 764; *People v. Benjamin*, 32 Cal. App. 449, 163 Pac. 235; *People v. Stephens*, 29 Cal. App. 616, 621, 157 Pac. 570, 572; *People v. Villalovas*, 29 Cal. App. 537, 156 Pac. 982; *People v. Youtz*, 26 Cal. App. 440, 147 Pac. 222; *People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63 (holding that the fact that the character of the prosecuting witness is bad and the

mony is inherently improbable.²⁰ There is no distinction in this respect between witnesses of different nationalities,¹ or between adult or infant witnesses.² Therefore, in passing upon the question whether the evidence is sufficient to sustain the verdict, an appellate court must assume the truth of the facts in support of the verdict, and the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.³ Even though there be contradictions in the testimony of the prosecuting witness, it is for the jury to decide whether the contradictions impeached his testimony. An appellate court cannot substitute its judgment for that of the jury, there being nothing inherently improbable in the testimony. Although a witness contradicts himself, his testimony is, nevertheless, evidence in the case to be re-

defendant's reputation is good cannot be considered by an appellate court in determining the sufficiency of the evidence); *People v. Hoosier*, 24 Cal. App. 746, 752, 142 Pac. 514; *People v. Bonzani*, 24 Cal. App. 549, 141 Pac. 1062; *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013; *People v. White*, 5 Cal. App. 329, 90 Pac. 471.

Appellate courts are not concerned with contradictions in the testimony of a witness unless they are such as to render the material portions of his testimony palpably improbable or unbelievable. *People v. Clayberg*, 26 Cal. App. 614, 624, 147 Pac. 994.

20. See *infra*, § 582.

1. *People v. Henry Quan Chuck*, 24 Cal. App. 471, 141 Pac. 940.

2. *People v. Lopez*, 34 Cal. App. Dec. 562, 197 Pac. 144 (holding that the testimony of a child cannot be considered otherwise upon appeal than like testimony given by an adult); *People v. Murnahan*, 32 Cal.

App. 211, 162 Pac. 422. See *People v. Harden*, 24 Cal. App. 522, 141 Pac. 1075, holding that the testimony of a child was so contradictory as to warrant the conclusion that the question of defendant's guilt was not dispassionately considered by the jury.

3. *People v. Tom Woo*, 181 Cal. 315, 326, 184 Pac. 389; *People v. Porter*, 32 Cal. App. Dec. 610, 191 Pac. 951; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *People v. Arberry*, 13 Cal. App. 749, 114 Pac. 411; *Larue v. Davis*, 8 Cal. App. 750, 97 Pac. 903 (prosecution under Pen. Code, § 772).

When reviewing the evidence, it is the duty of the court to assume that the verdict was predicated upon any theory reasonably deducible from the evidence which will support it; *People v. Rose*, 42 Cal. App. 540, 183 Pac. 874.

ceived and weighed by the jury.⁴ And although there is no direct evidence contradicting the defendant, circumstantial evidence may be such that the jury is not required to believe him.⁵ Yet, the power of the jury to reject testimony is not an arbitrary one. It has been held if they render a verdict in disregard of testimony which is uncontradicted and in no way inherently impossible, and which is such that no unbiased and reasonable man can say there is no reasonable doubt of the defendant's guilt, the verdict will be set aside as contrary to the evidence.⁶

§ 580. When There is No Legal Evidence to Support Verdict.—The sufficiency of the evidence to sustain a verdict is a question of law when the question is whether there is any evidence to justify the verdict,⁷ or whether

4. *People v. Mooney*, 177 Cal. 642, 171 Pac. 690; *People v. Durrant*, 116 Cal. 179, 200, 48 Pac. 75; *People v. Belardes*, 5 Cal. Unrep. 663, 48 Pac. 624; *People v. Raich*, 26 Cal. App. 286, 146 Pac. 907; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514; *People v. Bonzani*, 24 Cal. App. 549, 556, 141 Pac. 1062; *People v. Crawford*, 24 Cal. App. 396, 403, 141 Pac. 824; *People v. Preston*, 19 Cal. App. 675, 127 Pac. 660; *People v. Burke*, 18 Cal. App. 72, 79, 122 Pac. 435; *People v. Rigby*, 11 Cal. App. 275, 104 Pac. 840.

5. *People v. Carnes*, 33 Cal. App. Dec. 121, 192 Pac. 1088.

6. *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039. See *infra*, § 583.

7. *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *People v. Fitzgerald*, 138 Cal. 38, 70 Pac. 1014; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Kuches*, 120

Cal. 566, 52 Pac. 1002; *People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *People v. Durrant*, 116 Cal. 179, 201, 48 Pac. 75; *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Bird*, 60 Cal. 7 (an appellate court is not authorized to set aside a verdict on the ground of the insufficiency of the proof "unless the evidence is so slight as that the court below would be justified in directing a verdict for defendant"); *People v. Smallman*, 55 Cal. 185; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Bailey*, 38 Cal. App. 521, 176 Pac. 880 (holding that evidence which is purely circumstantial and raises at best only a suspicion of guilt is of such an unsubstantial nature as to amount to no proof at all); *People v. Lichtenstein*, 22 Cal. App. 592, 605, 135 Pac. 692; *People v. Russo*, 8 Cal. App. 636, 97 Pac. 700; *People v. Caulfield*, 7 Cal. App. 656, 95 Pac. 666.

the evidence is of such a character as to justify the appellate court in saying that a reasonable mind uninfluenced by passion or prejudice could not reach the conclusion of guilt.⁸ Where it is not clear that the verdict must have been rendered under the influence of passion or prejudice, an appellate court cannot examine the record except to determine whether legal evidence has been offered sufficient to warrant a conviction. The question is one of fact, and hence, the verdict is conclusive upon appeal if it is based on legal evidence,⁹ or if it is supported by "some,"¹⁰ or by "any,"¹¹ or by "substantial,"¹² evidence tending to show the guilt of the defendant. In such cases much must be left to the discretion of the jury, who saw the witnesses and observed their demeanor on the stand.¹³ It must be assumed in the absence of anything in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice.¹⁴ An appellate court cannot substitute its judgment for that of the jury.¹⁵ And the mere fact that the evidence does not seem to be very strong and convincing does not authorize that court to set the verdict aside.¹⁶ It is not a question of whether

8. See *infra*, §§ 582, 583.

9. *People v. Gonzales*, 143 Cal. 605, 77 Pac. 448; *People v. Donnelly*, 143 Cal. 394, 398, 77 Pac. 177; *People v. Fitzgerald*, 138 Cal. 38, 70 Pac. 1014; *People v. Maroney*, 109 Cal. 279, 41 Pac. 1097; *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691; *People v. Meyers*, 5 Cal. App. 674, 91 Pac. 167.

10. *People v. Nagle*, 3 Cal. Unrep. 488, 29 Pac. 640.

11. *People v. Wong Chong Suey*, 110 Cal. 117, 42 Pac. 420; *People v. Goslaw*, 73 Cal. 323, 14 Pac. 788.

12. *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389; *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep.

141, 62 Pac. 742 (holding that where a verdict of a jury is based upon substantial evidence it will not be disturbed upon appeal, although it may not be supported by a preponderance of the testimony); *Larue v. Davis*, 8 Cal. App. 750, 97 Pac. 903.

13. *People v. Doane*, 77 Cal. 560, 20 Pac. 84.

14. *People v. Price*, 26 Cal. App. 544, 147 Pac. 591; *People v. Lewis*, 18 Cal. App. 359, 364, 123 Pac. 232.

15. *People v. Taylor*, 33 Cal. App. Dec. 335, 193 Pac. 871.

16. *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95; *People v. Fowler*, 30 Cal. App. 183, 157 Pac. 540.

the appellate court is convinced of defendant's guilt or satisfied of his innocence. If it can find any evidence in the record from which arises a rational inference of the defendant's guilt, it can go no further.¹⁷ It has been suggested that if the only evidence in support of a verdict is of a character denominated slight evidence, the finding will be set aside.¹⁸ There is a class of crimes of which it has been often said that the charge is easy to make and hard to disprove. In such cases jurors are sometimes moved by abhorrence of the offense upon slight evidence; and upon appeal a court will look closely into the conduct of the trial to see that there was some substantial evidence to warrant a verdict of guilty.¹⁹

§ 581. Where Evidence is Conflicting or is Susceptible of Different Inferences.—Appellate courts are not authorized to reverse a judgment of conviction because of conflicts in the testimony, or because of inconsistencies or disparities in the testimony of any one witness,²⁰ or because of conflicts between the testimony of different wit-

17. *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150.

To authorize the court to interfere it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below; *People v. Kangiesser*, 44 Cal. App. 345, 186 Pac. 388; *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389.

18. *People v. Williams*, 133 Cal. 165, 65 Pac. 323 (a question of law is presented if there is a total absence of evidence upon some essential matter, and perhaps if the evidence is so slight as not to amount to satisfactory proof within the meaning of section 1835 of the Code of Civil Procedure); *People v.*

Stewart, 80 Cal. 129, 22 Pac. 124 (defining slight evidence as evidence which is not ordinarily sufficient to produce moral certainty or conviction in an unprejudiced mind).

19. *People v. Stouter*, 142 Cal. 146, 75 Pac. 780.

20. *People v. Daniels*, 70 Cal. 521, 11 Pac. 655; *People v. Ah Gee*, 37 Cal. App. 1, 7, 174 Pac. 371 (holding that a court will not reverse a case because the testimony tends to disclose two different and inconsistent theories of how the accused committed the act charged); *People v. Eddards*, 25 Cal. App. 660, 145 Pac. 173; *People v. Amadio*, 25 Cal. App. 729, 145 Pac. 151. See *infra*, § 582.

nesses,¹ or because the testimony is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence. The mere fact that there is a conflict in the evidence does not give rise to a reasonable doubt of defendant's guilt as a matter of law.² On the contrary, the rule is that the verdict or finding of a jury is conclusive upon appeal, where the evidence is reasonably susceptible of different inferences,³ or where the evidence is in substantial conflict.⁴ The sufficiency of

1. *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130.

2. *People v. Durrant*, 116 Cal. 179, 200, 48 Pac. 75; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396 (in opinion denying a rehearing); *People v. Slaughter*, 33 Cal. App. 365, 382, 165 Pac. 44.

3. *People v. Lewis*, 141 Cal. 543, 75 Pac. 189; *People v. Meyers*, 39 Cal. App. 244, 178 Pac. 965 (in ruling of the supreme court in denying a rehearing); *People v. Crane*, 34 Cal. App. 599, 168 Pac. 377.

4. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (where there was a conflict of expert testimony); *People v. Loomis*, 170 Cal. 347, 149 Pac. 581 (conflict of expert testimony); *People v. Moore*, 155 Cal. 237, 100 Pac. 688; *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *People v. Willard*, 150 Cal. 548, 553, 89 Pac. 124; *People v. Nihell*, 144 Cal. 200, 77 Pac. 916; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Lawrence*, 143 Cal. 148, 152, 68 L. R. A. 193, 76 Pac. 893; *People v. Soap*, 127 Cal. 408, 59 Pac. 771; *People v. Larrabee*, 115 Cal. 158, 46 Pac. 922 (where there was a conflict of expert testimony); *People v. Roemer*, 114 Cal. 51, 45 Pac. 1003; *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Faulke*, 96 Cal. 17,

30 Pac. 837; *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096; *People v. Ah Jake*, 91 Cal. 98, 27 Pac. 595; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *People v. Bird*, 60 Cal. 7; *People v. Alviso*, 55 Cal. 230; *People v. Smallman*, 55 Cal. 185; *People v. Montgomery*, 53 Cal. 576; *People v. Simpson*, 50 Cal. 304; *People v. Hamilton*, 46 Cal. 540; *People v. Gill*, 45 Cal. 285; *People v. Brown*, 27 Cal. 500; *People v. Ah Ti*, 9 Cal. 16; *People v. Morrison*, 36 Cal. App. Dec. 367, 202 Pac. 348; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Truitt*, 33 Cal. App. Dec. 451, 194 Pac. 295; *People v. Adkins*, 33 Cal. App. Dec. 324, 193 Pac. 800; *People v. Torres*, 32 Cal. App. Dec. 889, 192 Pac. 175; *People v. Vickroy*, 41 Cal. App. 275, 182 Pac. 764; *People v. Bernal*, 40 Cal. App. 358, 180 Pac. 825; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396; *People v. Charlie*, 34 Cal. App. 411, 167 Pac. 703; *People v. Eddards*, 25 Cal. App. 660, 145 Pac. 173; *People v. Rader*, 24 Cal. App. 477, 481, 141 Pac. 958; *People v. Matson*, 30 Cal. App. 288, 158 Pac. 335; *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058; *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858; *People v. Ward*, 14 Cal. App. 143, 111 Pac.

the evidence in the presence of a conflict therein may not be tested on appeal by the weight which the members of the court might have given it had they been sitting as jurors on the trial of the case.⁵ The evidence, even though conflicting, must be considered and resolved favorably to the finding of the jury.⁶ If it bears against the defendant, considered by itself and without regard to conflicting evidence, and tends to support the verdict, the question is not one of law, but of fact upon which the decision of the jury is conclusive.⁷ It is not material in the application of this rule whether the conflict be between witnesses for opposite sides or between witnesses all upon the same side.⁸ Although the defendant's own story exculpates him, it is for the jury to say whether that story should be believed.⁹

265; *People v. Loomer*, 13 Cal. App. 654, 110 Pac. 466 (holding that the appellate court will not disturb a verdict, although the jury might properly have reached a different conclusion upon the evidence); *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858.

5. *People v. Un Dong*, 106 Cal. 84, 39 Pac. 12; *People v. Evans*, 5 Cal. Unrep. 125, 41 Pac. 444; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396; *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553.

6. *People v. Silva*, 32 Cal. App. Dec. 984, 192 Pac. 330.

7. *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Emerson*, 130 Cal. 562, 62 Pac. 1069; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51; *People v. Moore*, 32 Cal. App. Dec. 614, 191 Pac. 981; *People v. Pasqueria*, 30 Cal. App. 625, 159 Pac. 173; *People v. Stephens*, 29 Cal. App. 616, 157 Pac. 570, 572; *People v. Antunez*, 28 Cal. App. 740, 153 Pac. 963; *People v. Clapp*,

26 Cal. App. 523, 526, 147 Pac. 469; *People v. Barlow*, 17 Cal. App. 375, 119 Pac. 940; *People v. Saunders*, 13 Cal. App. 743, 746, 110 Pac. 825.

8. *People v. Mooney*, 177 Cal. 642, 651, 171 Pac. 690; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514; *People v. Hales*, 23 Cal. App. 731, 139 Pac. 667; *People v. Matezowski*, 11 Cal. App. 465, 105 Pac. 425. See *supra*, § 579.

9. *People v. Rongo*, 169 Cal. 71, 145 Pac. 1017; *People v. Searns*, 119 Cal. 267, 51 Pac. 325; *People v. Strange*, 61 Cal. 496; *People v. Adkins*, 33 Cal. App. Dec. 324, 193 Pac. 800; *People v. Wilhite*, 33 Cal. App. Dec. 126, 193 Pac. 151; *People v. Moore*, 32 Cal. App. Dec. 614, 191 Pac. 980; *People v. Billings*, 34 Cal. App. 549, 563, 168 Pac. 396 (per opinion denying rehearing); *People v. McDonnell*, 32 Cal. App. 694, 163 Pac. 1046; *People v. Stephens*, 29 Cal. App. 616, 157 Pac. 570, 572; *People v. Clapp*, 26 Cal. App. 523, 147 Pac. 469.

The rule applicable to conflicting evidence does not prevent the review of the sufficiency of the evidence where the conflicting evidence is as to facts which, if proven, do not make out the crime charged.¹⁰

Where evidence consists of presumption.—A presumption is evidence, and may support a verdict as against positive testimony. While, as has been stated, as against a fact proved or admitted, disputable presumptions are dispelled, and no conflict arises, when it is undertaken to prove a fact against the presumption, it remains with the jury to say whether or not the fact has been proved.¹¹

§ 582. Where Testimony is Inherently Improbable.—A question at law is presented which authorizes an appellate court in setting aside a verdict, if the testimony relied upon by the prosecution is apparently so improbable or false as to be incredible and to amount to no evidence at all. If it is of this character, the court is justified in assuming that the verdict obtained was the result of passion or prejudice rather than of a calm and dispassionate consideration of the evidence.¹² To authorize a reversal under this rule, the improbability must appear very plainly.¹³ It has been said that the conclusions of the jury will be overruled only where the uncorroborated testimony of the complaining witness is so obviously and so

10. *People v. O'Brien*, 106 Cal. 104, 39 Pac. 325.

11. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863; *People v. Milner*, 122 Cal. 171, 54 Pac. 833. See *supra*, § 141.

12. *People v. Niino*, 183 Cal. 126, 190 Pac. 626; *People v. Willard*, 150 Cal. 548, 89 Pac. 124; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Kruvosky*, 35 Cal. App. Dec. 824, 200 Pac. 831; *People v. Airola*, 31 Cal. App. Dec.

421, 188 Pac. 817; *People v. Billings*, 34 Cal. App. 549, 168 Pac. 396; *People v. Bose*, 28 Cal. App. 743, 153 Pac. 965; *People v. Harden*, 24 Cal. App. 522, 527, 141 Pac. 1075; *People v. Bond*, 13 Cal. App. 175, 180, 109 Pac. 150; *People v. Ah Lung*, 2 Cal. App. 278, 83 Pac. 296.

13. *People v. Antunez*, 28 Cal. App. 740, 153 Pac. 963; *People v. Lewis*, 18 Cal. App. 359, 364, 123 Pac. 232.

inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment.¹⁴

The mere fact that there are contradictions and inconsistencies in the testimony of a witness,¹⁵ or that the truth of his evidence is open to suspicion,¹⁶ does not render it inherently improbable within the meaning of the rule. It is for the jury to consider such inconsistencies and determine whether they were such as to justify the repudiation of the testimony of the witness in its entirety.¹⁷ The test is not whether the witness is truthful, but whether it can be said the testimony in support of the verdict is inherently untrue.¹⁸ Nor is testimony inherently improbable merely because it is unusual or out of the ordinary.¹⁹ A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable, per se, must involve a claim that something has been done that it would not seem possible could be done under the circumstances described.²⁰

§ 583. Where Verdict is Result of Passion or Prejudice.

When the evidence relied on by the prosecution is of such a character as to justify an appellate court in saying that a reasonable mind uninfluenced by passion or prejudice could not reach the conclusion of guilt, a question of law

14. *People v. Lewis*, 18 Cal. App. 359, 364, 123 Pac. 232 (followed in *People v. Antunez*, 28 Cal. App. 740).

15. *People v. Cesena*, 90 Cal. 381, 27 Pac. 300; *People v. Airola*, 31 Cal. App. Dec. 421, 188 Pac. 817; *People v. Avena*, 34 Cal. App. 500, 168 Pac. 148; *People v. Slaughter*, 33 Cal. App. 365, 382, 165 Pac. 44; *People v. Amadio*, 25 Cal. App. 729, 145 Pac. 151; *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058; *People v. Haydon*, 18 Cal. App. 543, 123 Pac. 1102. See *supra*, § 579.

16. *People v. Fraysier*, 36 Cal. App. 579, 172 Pac. 1126.

17. *People v. Thourwald*, 31 Cal. App. Dec. 570, 189 Pac. 124.

18. *People v. Crawford*, 24 Cal. App. 396, 403, 141 Pac. 824.

19. *People v. Moore*, 155 Cal. 237, 100 Pac. 688 (explaining *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506); *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928; *People v. Slaughter*, 33 Cal. App. 365, 383, 165 Pac. 44; *People v. West*, 25 Cal. App. 735, 146 Pac. 63.

20. *People v. Haydon*, 18 Cal. App. 543, 556, 123 Pac. 1102, 1114.

is presented which warrants the court in setting the verdict aside.¹ While ordinarily an appellate court will not deal with a question of mere preponderance of evidence,² when it so clearly and unquestionably preponderates against the verdict as to convince the appellate court that its return was the result of passion or prejudice on the part of the jury, the verdict will be set aside.³ The mere fact that the witnesses in favor of the defendant preponderated in numbers over the witnesses for the prosecution does not render their verdict of guilty erroneous as a matter of law.⁴ The jury are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.⁵ To justify an interference with the verdict, a case must be presented in which there is a "decided preponderance of evidence" in favor of the defendant,⁶ and in which there is in the record full justification for believing the verdict was the expression of passion and prejudice rather than deliberate judgment.⁷ Ordinarily, a recommendation of the prisoner to

1. *People v. Niino*, 183 Cal. 126, 190 Pac. 620; *People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *People v. Durrant*, 116 Cal. 176, 207, 48 Pac. 75; *People v. Ross*, 115 Cal. 233, 46 Pac. 1059; *People v. Hamilton*, 46 Cal. 540; *People v. Acosta*, 10 Cal. 195; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51.

2. *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096; *People v. Ashnauer*, 47 Cal. 98; *People v. Burt*, 2 Cal. Unrep. 295, 3 Pac. 653. See *supra*, § 581.

3. *People v. Willard*, 150 Cal. 543, 553, 89 Pac. 124; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101;

People v. Wong Chong Suey, 110 Cal. 117, 42 Pac. 420; *People v. Manning*, 48 Cal. 335; *People v. Hamilton*, 46 Cal. 540; *People v. Vance*, 21 Cal. 400; *People v. Harden*, 24 Cal. App. 522, 141 Pac. 1075.

4. *People v. Sternberg*, 127 Cal. 511, 59 Pac. 942.

5. Code Civ. Proc., § 2061, subd. 2; *People v. Sternberg*, 127 Cal. 511, 59 Pac. 942.

6. *People v. Brown*, 27 Cal. 500; *People v. Ah Loy*, 10 Cal. 301.

7. *People v. Lewis*, 18 Cal. App. 359, 123 Pac. 232.

the mercy of the court clearly negatives the idea of passion or prejudice on the part of the jury.⁸

§ 584. Where Evidence is Circumstantial.—While ordinarily the deduction to be drawn from the circumstances is one for the jury, a question of law for the court is presented when every incriminating circumstance relied on is equally compatible with innocence.⁹ But in reference to this rule it has been said that the principle, while proper for the guidance of the jury, cannot be accepted as a rule of universal application to guide the appellate court in all cases arising out of or dependent upon circumstantial evidence. A verdict and judgment based upon circumstantial evidence is to be reviewed as any other judgment. If the circumstances are such as reasonably to justify the inference of guilt, the finding of the jury is conclusive upon the appellate court, although an inference of innocence might also reasonably have been drawn. But if the inference of guilt is wholly unwarranted, that is to say, if the evidence is such that the court is authorized to conclude that there is no evidence to support the verdict, a question of law is presented.¹⁰ Evidence showing an opportunity to commit the crime does not justify a conviction apart from other circumstances, unless it excludes all reasonable opportunity for its commission by another.¹¹ Nor are false statements or suspicious circumstances alone

8. *People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *People v. Lopez*, 34 Cal. App. Dec. 562, 197 Pac. 144.

9. *People v. Staples*, 149 Cal. 405, 425, 86 Pac. 886 (followed in *Wilbur v. Emergency Hospital Assn.*, 27 Cal. App. 751, 151 Pac. 155, a civil case); *People v. Eagan*, 116 Cal. 287, 291, 48 Pac. 120; *People v. Ong Git*, 14 Cal. App. 278, 111 Pac. 630 (holding that the evidence is insufficient as a matter of law

if it is entirely consistent with the innocence of the defendant). See *supra*, § 405, as to circumstantial evidence.

10. *People v. Muhly*, 15 Cal. App. 416, 114 Pac. 1017. Followed in *People v. Martinez*, 20 Cal. App. 343, 128 Pac. 952.

11. *People v. Tom Woo*, 181 Cal. 318, 328, 184 Pac. 389; *People v. Tarbox*, 115 Cal. 57, 65, 46 Pac. 896.

sufficient to support a verdict.¹² But where the conduct of a defendant subsequent to the crime is attributable to different causes, it is for the jury to say whether it was attributable to a consciousness of guilt.¹³

§ 585. Application of Rule to Particular Findings.—

The rules above discussed are equally applicable to the findings of a jury upon particular questions of fact. If there is evidence in the case to support a jury's findings as to a particular fact, or if there is a substantial conflict in the evidence, the appellate court cannot disturb the verdict, for in such case no question of law is presented. This rule has been applied to the following findings: as to the place of the commission of the crime;¹⁴ as to the identity of the defendant as the criminal;¹⁵ as to the intent with which a criminal act was done;¹⁶ as to the sanity of the defendant;¹⁷ as to the age of a person, whose age is involved;¹⁸ as against a claim of self-defense;¹⁹ and

12. *People v. Tom Woo*, 181 Cal. 318, 328, 184 Pac. 389.

13. *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611.

14. *People v. Alviso*, 55 Cal. 230 (a finding of a jury as to whether the locus of the crime was within five hundred yards of a county line is conclusive, when the evidence is conflicting); *People v. Magallones*, 15 Cal. 426.

15. *People v. Benjamin*, 158 Cal. 158, 110 Pac. 302; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Sternberg*, 127 Cal. 510, 59 Pac. 942; *People v. Cappola*, 6 Cal. Unrep. 232, 56 Pac. 248; *People v. Loza*, 41 Cal. App. 390, 182 Pac. 462; *People v. Delgado*, 37 Cal. App. 807, 175 Pac. 24; *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553.

16. *People v. Wells*, 145 Cal. 138, 78 Pac. 470; *People v. Hite*, 135 Cal.

76, 67 Pac. 57; *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *People v. Goslow*, 73 Cal. 323, 14 Pac. 788; *People v. Woody*, 48 Cal. 80; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009.

17. *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (where there was a conflict of expert testimony as to sanity); *People v. Loomis*, 170 Cal. 347, 149 Pac. 581 (where the evidence was conflicting); *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *People v. Geiger*, 116 Cal. 440, 48 Pac. 389; *People v. Larrabee*, 115 Cal. 158, 46 Pac. 922.

18. *People v. Babcock*, 160 Cal. 537, 117 Pac. 549 (where there was conflicting testimony as to age of prosecuting witness).

19. *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *People v. Stokes*, 11 Cal. App. 759, 106 Pac. 251.

as against a claim of alibi.²⁰ The question as to the degree of a crime, where the jury have a right to draw an inference from the facts, is peculiarly a question for the jury, and with its determination the appellate court cannot interfere.¹ So also the appellate court cannot interfere with the exercise of the judgment of the jury as to what penalty to award for a crime punishable with death or life imprisonment.²

§ 586. Finding of Court.—Under the rule above stated, a ruling of a trial court upon a question depending upon evidence can be reviewed upon appeal only when the question becomes one of law. If the evidence is conflicting, the finding is conclusive if supported by some material evidence. This rule is equally applicable whether the evidence is oral or documentary. In the consideration of an order made upon affidavits involving the decision of a question of fact, the appellate court is bound by the same rule which controls it where oral testimony is presented for review.³ If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established.⁴ This rule has been applied to the following findings based upon conflicting affidavits or evidence: a finding upon an application for a change of judge⁵ or for a change of venue;⁶ a finding upon a question of fact made

20. *People v. Sears*, 119 Cal. 267, 270, 51 Pac. 325; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514; *People v. Shehadey*, 12 Cal. App. 648, 657, 108 Pac. 146.

1. *People v. Rico*, 180 Cal. 385, 181 Pac. 663; *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384. See *supra*, § 337.

2. *People v. Glover*, 141 Cal. 233, 246, 74 Pac. 745.

3. *People v. Western Meat Co.*, 13 Cal. App. 539, 110 Pac. 338.

4. *People v. Western Meat Co.*, 13 Cal. App. 539, 544, 110 Pac. 338; *People v. Long*, 7 Cal. App. 27, 93 Pac. 387.

5. *People v. Findley*, 132 Cal. 301, 64 Pac. 472; *People v. Phillips*, 30 Cal. App. 31, 157 Pac. 1003, 1005.

6. *People v. Beggs*, 178 Cal. 79, 92, 172 Pac. 152; *People v. Lesse*, 34 Cal. App. Dec. 1011, 199 Pac. 46.

at the hearing of a motion to set aside an information;⁷ a determination whether a defendant in withdrawing a plea of not guilty and entering a plea of guilty did so under a misapprehension of the scope and effect of such plea;⁸ a finding upon the sufficiency of preliminary proof to authorize the introduction of certain evidence;⁹ a finding that an entry was made by mistake;¹⁰ and a finding upon a motion to vacate the judgment.¹¹ Whether statements of the judge from the bench can be considered as the equivalent of affidavits so as to create a conflict is an open question.¹²

§ 587. Finding upon Challenge.—The rule that the appellate court is limited in its review of criminal cases to questions of law alone¹³ applies to a finding upon a challenge to the panel, on the ground of bias of the sheriff who summoned them;¹⁴ and to a finding upon a challenge to a juror on the ground of actual bias.¹⁵ Whether the

7. *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863.

8. *People v. Paraskevopolis*, 42 Cal. App. 325, 183 Pac. 585.

9. *People v. Fowler*, 178 Cal. 597, 662, 174 Pac. 892; *People v. Calpestri*, 35 Cal. App. Dec. 883, 886, 200 Pac. 1054; *People v. Tugwell*, 28 Cal. App. 348, 152 Pac. 740; *People v. Hoosier*, 24 Cal. App. 746, 756, 142 Pac. 514; *People v. Warren*, 12 Cal. App. 731, 108 Pac. 725.

10. *People v. Curtis*, 113 Cal. 68, 45 Pac. 180.

11. *People v. Silver*, 154 Cal. 556, 98 Pac. 543.

12. See *People v. Blackman*, 127 Cal. 248, 59 Pac. 573 (not deciding the question).

13. See *supra*, § 579.

14. *People v. Hartman*, 130 Cal. 487, 62 Pac. 823.

15. *People v. Schoon*, 177 Cal. 678, 171 Pac. 680; *People v. Ed-*

wards, 163 Cal. 752, 127 Pac. 58; *People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Ryan*, 152 Cal. 364, 371, 92 Pac. 853; *People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *People v. Ochoa*, 142 Cal. 268, 274, 75 Pac. 847; *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340; *People v. Flannelly*, 128 Cal. 86, 60 Pac. 671; *People v. Evans*, 124 Cal. 206, 56 Pac. 1024; *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *People v. Owens*, 123 Cal. 482, 56 Pac. 251 (order allowing challenge); *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040; *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Wells*, 100 Cal. 227, 34 Pac. 1078; *People v. Vasquez*, 49 Cal. 560; *People v. Brotherton*, 47 Cal. 388, 396; *People v. Fuski*, 60 Cal. Dec.

state of mind of a juror is such as to constitute actual bias within the definition of the code is a question of fact to be determined by the trial court. When the evidence of each juror is contradictory in itself, and is subject to more than one construction, a finding by the trial court either way upon the challenge is conclusive upon an appeal. The appellate court will interfere only when the evidence adduced on the voir dire is of such a character that it can be said from it as a matter of law that the juror was so prejudiced or biased that he could not be a fair juror. If there is an entire absence of evidence to support the finding that the opinion of the juror was founded upon public rumor, the question becomes one of law.¹⁶

§ 588. Finding on Motion for New Trial.—When affidavits in support of a motion for a new trial are contradicted by counter-affidavits, there is a substantial conflict in the testimony which it is the province of the trial court to determine, and its determination is conclusive upon appeal.¹⁷ This rule has been applied where conflicting affidavits were filed as to the misconduct of a juror,¹⁸ the district attor-

349, 32 Cal. App. Dec. 1038, 192 Pac. 552; *People v. Hartwell*, 39 Cal. App. 24, 177 Pac. 885; *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044; *People v. Schmidt*, 33 Cal. App. 426, 442, 165 Pac. 555; *People v. Slaughter*, 33 Cal. App. 365, 165 Pac. 44; *People v. Martinez*, 31 Cal. App. 413, 160 Pac. 868; *People v. Overacker*, 20 Cal. App. 67, 127 Pac. 1059; *People v. Harrison*, 13 Cal. App. 288, 293, 123 Pac. 200; *People v. Ruef*, 14 Cal. App. 576, 592, 114 Pac. 48, 54; *People v. Harrison*, 13 Cal. App. 555, 110 Pac. 345; *People v. Duncan*, 8 Cal. App. 186, 96 Pac. 414; *People v. Maughas*, 8 Cal. App. 107, 96

Pac. 407; *People v. Collins*, 6 Cal. App. 492, 506, 92 Pac. 513.

Although the text is broad enough to include orders allowing challenges interposed by the prosecution, and although such orders have been reviewed, it is questionable if the defendant has a right to except to such an order. See *supra*, § 524.

16. *People v. Wells*, 100 Cal. 227, 34 Pac. 1078.

17. *People v. Cord*, 157 Cal. 565, 108 Pac. 511; *People v. Clark*, 151 Cal. 200, 90 Pac. 549; *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318.

18. *People v. Ung Sing*, 171 Cal.

ney,¹⁹ or trial judge.²⁰ And the rule applies also where affidavits are filed upon a motion for new trial upon the ground of newly discovered evidence.¹

§ 589. Where Motion is Based on Insufficiency of Evidence.—An appellate court may review the action of a trial court in granting or denying a new trial on the ground of the insufficiency of the evidence to justify the verdict.² But the propriety of granting or refusing a new trial rests so fully in the discretion of the trial court that its action is conclusive upon an appellate court, unless it appears that there has been an abuse of discretion.³ By denying a new trial the trial judge manifests his satisfaction with the sufficiency of the evidence,⁴ and this fact

83, 88, 151 Pac. 1145; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101 (intoxication of juror); *People v. Kramer*, 117 Cal. 647, 650, 49 Pac. 842; *People v. Dye*, 62 Cal. 523; *People v. Anthony*, 56 Cal. 397; *People v. Wilson*, 36 Cal. App. 589, 172 Pac. 1116; *People v. Horn*, 25 Cal. App. 583, 592, 144 Pac. 641; *People v. Williams*, 24 Cal. App. 646, 142 Pac. 124 (intoxication of juror); *People v. Boyd*, 16 Cal. App. 130, 116 Pac. 323; *People v. Romero*, 12 Cal. App. 466, 107 Pac. 709; *People v. White*, 5 Cal. App. 329, 336, 90 Pac. 471 (misconduct at a view).

19. *People v. Clark*, 151 Cal. 200, 90 Pac. 549 (assuming purely for the purpose of the decision that a claim of misconduct may be urged as ground for a new trial); *People v. Rushing*, 130 Cal. 449, 450, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Gastone*, 37 Cal. App. 51, 173 Pac. 409.

20. *People v. Clark*, 151 Cal. 200, 208, 90 Pac. 549.

1. *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. Fice*, 97 Cal. 459, 32 Pac. 531; *People v. Mar Gin Suie*, 11 Cal. App. 42, 56, 103 Pac. 951.

2. *People v. Jones*, 31 Cal. 565, 576 (per Sanderson, J., concurring, holding it to be a question of law whether the defendant is entitled to a new trial).

3. *People v. Gonzales*, 143 Cal. 605, 77 Pac. 448; *People v. Merkle*, 89 Cal. 82, 26 Pac. 642; *People v. Forsythe*, 65 Cal. 101, 3 Pac. 402; *People v. Petros*, 25 Cal. App. 236, 143 Pac. 246; *People v. Ostrander*, 23 Cal. App. 241, 137 Pac. 619 (order granting new trial); *People v. Martin*, 19 Cal. App. 295, 299, 125 Pac. 919; *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553. See *supra*, § 464.

4. *People v. Kuches*, 120 Cal. 566, 52 Pac. 1003; *People v. Lewis*, 18 Cal. App. 359, 123 Pac. 232.

must be given weight by an appellate court in passing upon the evidence.⁵ Cases have occurred where an appellate court has felt itself constrained in the interest of justice to override the conclusions of the jury and the trial court, but such cases are rare, and, it has been said, occur only where it obviously appears that the testimony upon which the conviction was had is in and of itself or when considered in conjunction with the undisputed facts of the case, so inherently improbable as to be impossible of belief, and therefore considered to be in effect no evidence at all.⁶

X. HARMLESS AND REVERSIBLE ERROR.

In General.

§ 590. Nature of Error—Prejudicial Character.—The code provides that

“After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.”⁷

And it also provides as follows:

“Neither a departure from the form or mode prescribed by the code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.”⁸

The Practice Act contained similar provisions.⁹ Under these provisions, it has always been the practice to disre-

5. *People v. Kuches*, 120 Cal. 566, 52 Pac. 1003; *People v. Neary*, 104 Cal. 373, 381, 37 Pac. 943; *People v. Woods*, 43 Cal. 177; *People v. Price*, 26 Cal. App. 544, 147 Pac. 591; *People v. Lewis*, 18 Cal. App. 359, 123 Pac. 232; *People v. Jensen*, 15 Cal. App. 220, 114 Pac. 585.

6. *People v. Von Perhacs*, 28 Cal. App. 48, 127 Pac. 1048 (a rape case); *People v. Lewis*, 18 Cal. App. 359, 123 Pac. 232.

7. Pen. Code, § 1258.

8. Pen. Code, § 1404.

9. See earlier cases cited *infra*.

gard errors when they are trivial or when the record shows that no prejudice to the substantial rights of the defendant resulted therefrom.¹⁰ But where neither of these conditions existed, and the error was one which might or might not have turned the scale against the defendant, the limitation of the appellate jurisdiction to "questions of law," prior to the year 1911, precluded the courts from weighing the evidence for the purpose of forming an opinion whether the error had or had not in fact worked injury, and required the court to apply the doctrine that injury was presumed from error.¹¹ It was to remedy this condition that section 4½ of article VI of the constitution was adopted in 1911.¹² As originally adopted, the amendment was limited to criminal cases, but in 1914 it was

10. *People v. O'Bryan*, 165 Cal. 55, 63, 130 Pac. 1042; *People v. Creeks*, 141 Cal. 529, 75 Pac. 101; *People v. Glaze*, 139 Cal. 154, 162, 72 Pac. 965; *People v. Wynn*, 133 Cal. 72, 65 Pac. 126; *People v. Clark*, 106 Cal. 32, 39 Pac. 53; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Majors*, 65 Cal. 138, 149, 52 Am. Rep. 295, 3 Pac. 597; *People v. Murback*, 64 Cal. 369, 30 Pac. 608; *People v. Nichols*, 62 Cal. 518; *People v. Smith*, 59 Cal. 601; *People v. Mortier*, 58 Cal. 262; *People v. Nelson*, 56 Cal. 77, 82; *People v. Sprague*, 53 Cal. 491; *People v. Turley*, 50 Cal. 469; *People v. Brotherton*, 47 Cal. 388, 404; *People v. Fenwick*, 45 Cal. 238; *People v. McKeehan*, 11 Cal. App. 443, 449, 105 Pac. 273; *People v. Moore*, 8 Cal. 90; *People v. Tugwell*, 32 Cal. App. 520, 528, 163 Pac. 508; *People v. Ruef*, 14 Cal. App. 576, 589, 114 Pac. 48, 54; *People v. Hutchings*, 8 Cal. App. 551, 558, 97 Pac. 325; *People v. Stokes*, 5 Cal. App. 205, 89 Pac. 997.

11. *People v. O'Bryan*, 165 Cal. 55, 63, 130 Pac. 1042; *People v. Richards*, 136 Cal. 127, 68 Pac. 477; *People v. Kelly*, 133 Cal. 1, 64 Pac. 1091; *People v. Marshall*, 112 Cal. 422, 44 Pac. 718; *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090; *People v. Eppinger*, 109 Cal. 295, 41 Pac. 1037; *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *People v. Moore*, 103 Cal. 508, 511, 37 Pac. 510; *People v. Chew Sing Wing*, 88 Cal. 268, 25 Pac. 1099; *People v. Sansome*, 84 Cal. 449, 24 Pac. 143; *People v. Furtodo*, 57 Cal. 345; *People v. Doyell*, 48 Cal. 85, 93; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Murphy*, 47 Cal. 103; *People v. Valencia*, 43 Cal. 556; *People v. Williams*, 18 Cal. 187, 194; *People v. Ybarra*, 17 Cal. 166; *People v. Hill*, 4 Cal. Unrep. 349, 34 Pac. 854.

12. See *supra*, § 8, to the effect that the provision is not *ex post facto*; and see *infra*, § 591, as to interpretation of the constitutional provision.

made to embrace all cases.¹³ While the provision of the constitution restricting jurisdiction of appellate courts to "questions of law alone" has not been in terms amended, this amendment empowers the appellate courts and imposes upon them the duty to examine the entire case including the evidence when determining the effect of error.¹⁴ And thereby it effectually abrogated the rule that injury is presumed from substantial error. Now the injury must appear affirmatively to the mind of the court after an examination of the entire cause including the evidence, or from the nature of the error itself.¹⁵ And the burden of showing the prejudicial tendency of errors is upon the appellant.¹⁶ Substantial injury as well as error must be made affirmatively to appear.¹⁷

§ 591. Interpretation of Constitutional Provision.—

Under the constitution an appellate court is forbidden to set aside a judgment or grant a new trial for any error as to a matter of pleading or procedure, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."¹⁸ The "examination of the entire cause, including the evidence"

13. See *APPEAL AND ERROR*, vol. 2, p. 1006, where this provision is quoted.

14. *People v. Fleming*, 166 Cal. 357, 371, Ann. Cas. 1915B, 881, 136 Pac. 291.

15. *People v. O'Bryan*, 165 Cal. 55, 65, 130 Pac. 1042; *People v. Malley*, 33 Cal. App. Dec. 346, 194 Pac. 48; *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511; *People v. Mazzurco*, 33 Cal. App. Dec. 153, 193 Pac. 164; *People v. Frost*, 37 Cal. App. 120, 174 Pac. 106; *People v. Stephens*, 29 Cal. App. 616, 157 Pac. 570, 572; *People v. Lawlor*, 21 Cal. App. 63, 70, 131 Pac. 63; *Peo-*

ple v. Merritt, 18 Cal. App. 58, 65, 122 Pac. 839, 844.

16. *People v. Driggs*, 14 Cal. App. 507, 112 Pac. 577.

17. *People v. Merritt*, 18 Cal. App. 58, 65, 122 Pac. 839, 844.

18. *People v. Alba*, 35 Cal. App. Dec. 160, 199 Pac. 894; *People v. Finali*, 31 Cal. App. 479, 160 Pac. 850 (erroneous instruction); *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63; *People v. Dye*, 29 Cal. App. 169, 182, 154 Pac. 875; *People v. Hoosier*, 24 Cal. App. 746, 759, 142 Pac. 514; *People v. Powers*, 23 Cal. App. 447, 454, 138 Pac. 373; *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63.

referred to in this provision, of course, means an examination of the cause as it is presented by the record, on appeal made up in the lower court.¹⁹ It is difficult to frame a satisfactory definition of the term "miscarriage of justice." The term is a general one and has not as yet acquired a precise meaning.²⁰ It has been said that the term, as here used, can only mean the conviction of a person who is probably innocent.¹ This definition is not wholly correct, however, for the phrase is equally applicable to cases where the acquittal or conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied.² The appellate court is not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But when he has been found guilty, it must, upon a review of the entire record, determine whether, in its judgment, any error committed has led to the verdict reached. If it appears to the satisfaction of the court that the result was just and that it would have been reached if the error had not been committed, a new trial is not to be ordered.³ But if it cannot be determined, from such examination, whether or not the defendant would have been convicted if the error had not been committed, the judgment must be reversed.⁴

19. *People v. Mooney*, 178 Cal. 105, 167 Pac. 696.

20. *People v. O'Bryan*, 165 Cal. 55, 64, 130 Pac. 1042.

1. *People v. Fleming*, 166 Cal. 357, 385, Ann. Cas. 1915B, 881, 136 Pac. 291 (per Beatty, C. J., specially concurring). See, also, *People v. Ho Kim You*, 24 Cal. App. 451, 468, 141 Pac. 950, where the court says: "The determination of an appellate court whether or not an irregularity in pleading or procedure has contributed to a miscarriage of justice in any case, must depend largely if

not entirely upon the opinion which the justices collectively form of the guilt or innocence of the defendant after having weighed the evidence in the individual case before it."

2. *People v. Wilson*, 23 Cal. App. 513, 524, 138 Pac. 971.

3. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Wilson*, 23 Cal. App. 513, 524, 138 Pac. 971; *People v. King*, 23 Cal. App. 259, 137 Pac. 1076; *People v. Lawlor*, 21 Cal. App. 63, 70, 131 Pac. 63.

4. *People v. MacPhee*, 26 Cal. App. 218, 146 Pac. 522.

The amendment of the constitution was not designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. For example, a denial to a defendant accused of a felony of a trial by jury would necessitate a reversal, even though there had been the clearest proof of guilt. Again, if a defendant after having been acquitted, should be again brought to trial and thereupon convicted, in disregard of his plea of once in jeopardy, it would scarcely be suggested that because he was in fact guilty, no "miscarriage of justice" had occurred. Yet it does not follow that every invasion of even a constitutional right necessarily requires a reversal. The final test is the opinion of the appellate court upon the result of the error.⁵ "Opinion" is probably used in the amendment in the sense of belief or conviction,⁶ and it is the "opinion" of the court, based upon a full consideration of the particular record, that is to control upon the question whether the error resulted in a miscarriage of justice. The appellate court must necessarily be vested with a large discretion in determining the effect of errors, and each case must depend upon its own circumstances.⁷ Whatever may be the purpose of the constitutional provision it cannot excuse failure to prove by competent evidence one of the essential elements of a crime.⁸

§ 592. Preliminary Examination, Indictment or Information, Arraignment and Plea.—It is a general rule that a judgment of conviction will not be set aside for mere irregularity in the preliminary examination and commitment which does not affect any of the substantial rights

5. *People v. O'Bryan*, 165 Cal. 55, 357, 371, Ann. Cas. 1915B, 881, 66, 130 Pac. 1042. 136 Pac. 291.

6. *People v. Bartol*, 24 Cal. App. 659, 666, 142 Pac. 510.

8. *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Levay*, 33

7. *People v. Fleming*, 166 Cal. Cal. App. Dec. 486, 194 Pac. 524.

of the defendant.⁹ For example, in the absence of a showing that the defendant's substantial rights were affected, a judgment will not be set aside because the preliminary examination was postponed beyond six days without the consent of the defendant;¹⁰ or because the order holding the defendant to answer was not written as required by law;¹¹ or because the defendant was not furnished with a copy of the testimony taken by the magistrate.¹² A discrepancy between the shorthand notes and the transcript is presumed harmless in the absence of any evidence in the record showing the materiality of the variance.¹³

Indictment or information.—Under the Penal Code, no indictment or information is insufficient, “nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits.”¹⁴

“Neither a departure from the form or mode prescribed by this code in respect to any pleading . . . renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.”¹⁵

9. *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495.

10. *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538.

11. *People v. Turner*, 28 Cal. App. 767, 154 Pac. 34.

12. *People v. Fritz*, 36 Cal. App. Dec. 61, 201 Pac. 349.

13. *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779.

14. Pen. Code, § 960; *People v. Mead*, 145 Cal. 500, 78 Pac. 1047; *People v. Swenson*, 49 Cal. 388 (holding that it is only when a quality essential to the crime is altogether omitted, and not where

such quality is imperfectly described, that a judgment will be set aside as not sustained by the indictment); *People v. Cronin*, 34 Cal. 191 (holding that the failure to state the means by which the crime was committed is harmless); *People v. Lauman*, 62 Cal. Dec. 441, 201 Pac. 459; *People v. Evanoff*, 30 Cal. App. Dec. 951, 187 Pac. 54 (holding that the failure to state the means of the commission of the crime is harmless).

15. Pen. Code, § 1404; *People v. Thompson*, 7 Cal. App. 616, 95 Pac. 386.

And under the constitution, as amended in 1911, no "error as to any matter of pleading" is ground for reversal which does not result in a miscarriage of justice.¹⁶ By virtue of these provisions, the rule in civil actions that form is subordinated to substance in pleading is with equal reason now made applicable to indictments and informations in criminal cases.¹⁷ Under the constitutional provision a defect in the pleading will not authorize a reversal if an examination of the record discloses that the defect did not affect the trial at all, and that the trial verdict and judgment would have been substantially the same if there had been no such defect.¹⁸ The filing of an amended information is not prejudicial if the original information purports to charge a public offense and the amendment does not charge a different offense.¹⁹ Any error in denying a motion to set aside an information for illegal commitment under a prior conviction is harmless where the charge of prior conviction is withdrawn before sentence.²⁰

Arraignment and plea.—A failure to take the plea of a defendant is not ground for reversal if the case was tried in all respects as if a plea had been entered, and the evidence

16. *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521; *People v. Gavin*, 33 Cal. App. Dec. 825, 195 Pac. 436; *People v. Malley*, 33 Cal. App. Dec. 346, 194 Pac. 48; *People v. Bruno*, 33 Cal. App. Dec. 234, 193 Pac. 511 (a failure to allege that the victim of kidnaping was a person is not ground for a reversal when this fact appeared from the evidence); *People v. Ruiz*, 39 Cal. App. 593, 179 Pac. 691; *People v. Brown*, 37 Cal. App. 101, 173 Pac. 621.

17. *People v. Thompson*, 7 Cal. App. 616, 95 Pac. 386.

18. *People v. Bonfanti*, 40 Cal.

App. 614, 181 Pac. 80 (where the information omitted to allege that the victim was not the wife of the defendant. Prior to the adoption of the constitution such a defect was ground for reversal; *People v. Everett*, 10 Cal. App. 12, 101 Pac. 528; *People v. Miles*, 9 Cal. App. 312, 101 Pac. 625); *People v. Brown*, 37 Cal. App. 101, 173 Pac. 621.

19. *People v. Miller*, 34 Cal. App. 641, 168 Pac. 574; *People v. Rippe*, 32 Cal. App. 514, 163 Pac. 506.

20. *People v. Gordon*, 13 Cal. App. 678, 110 Pac. 469.

abundantly shows the guilt of the defendant.¹ A mistake in the minutes of the court in stating whether the accusation upon which the defendant was arraigned was an indictment or information and in designating the offense is harmless.²

§ 593. Trial and Judgment.—A judgment will not be reversed because of errors or irregularities in the conduct of a trial in a criminal case which do not injuriously affect the substantial rights of a defendant, or result in a miscarriage of justice.³ A refusal of a continuance to procure testimony is harmless if the facts are proved by other witnesses.⁴ So also the exhibition to the jury of articles not formally introduced in evidence is harmless, where the facts are proved which are sufficient to authorize their admission in evidence.⁵ Ordinarily, the admission of evidence out of its regular order is not prejudicial to a

1. *People v. Tomskey*, 20 Cal. App. 672, 130 Pac. 184. But see *People v. Gaines*, 52 Cal. 479, decided before the adoption of section 4½ of article VI of the constitution.

2. *People v. Eppinger*, 109 Cal. 295, 41 Pac. 1037.

3. *People v. Weber*, 149 Cal. 325, 344, 86 Pac. 671 (holding that a failure to designate an item of evidence ordered stricken out is not prejudicial if the evidence is treated as stricken out); *People v. Greening*, 102 Cal. 384, 36 Pac. 665 (where the court refused to permit cross-examination to show conversations between the prosecuting witness and officers planning to entrap defendant); *People v. Lafuente*, 6 Cal. 202 (holding that the temporary suspension of a trial to dispose of a motion in another case is not an irregularity, at least where the defendant is not prejudiced thereby); *People v. Williams*,

27 Cal. App. 297, 149 Pac. 768 (holding that a defendant cannot complain of a failure of the court to rule upon an objection interposed by him if the result is equivalent to a formal ruling); *People v. Svendsen*, 25 Cal. App. 1, 142 Pac. 861 (erroneous limitation upon scope of cross-examination); *People v. Stock*, 19 Cal. App. 748, 127 Pac. 798 (holding that when a court, though without a doubt as to the present sanity of a defendant, submits the inquiry to a commission of physicians with the approval of the defendant, he cannot object to the irregularity in the proceedings, as the proceedings may be wholly disregarded in view of the fact the court had no doubt as to the defendant's sanity).

4. *People v. Goldenson*, 76 Cal. 328, 340, 19 Pac. 161.

5. *People v. Muruyama*, 19 Cal. App. 290, 125 Pac. 924.

defendant.⁶ A demand upon the defendant to produce documents erroneous because made in the presence of the jury⁷ will not require a reversal if harmless.⁸ It has been held that such a demand is without prejudice if it is not pressed,⁹ or if the court directs the jury to disregard it.¹⁰ An admonition of the court to the jury to disregard it will generally obviate any prejudice resulting from the erroneous admission of evidence,¹¹ or from improper remarks or conduct of the prosecuting attorney,¹² of bystanders,¹³ or of the judge himself.¹⁴ Any error of the trial court in limiting the time for argument is cured if additional time was granted and it is not claimed that the time actually accorded was inadequate.¹⁵ For the reason that an order excluding the public from the trial deprives the defendant of a right to a fair and impartial trial, it has been held that the burden of proving injury from such an order does not rest upon the defendant.¹⁶

Clerical mistakes in the minutes as to the judgment, which do not prejudice a defendant in a substantial right, are not ground for reversal.¹⁷

§ 594. Jury.—While a failure to inform the defendant of his right to challenge jurors is not ground for reversal

6. *People v. Slaughter*, 33 Cal. App. 365, 165 Pac. 44 (where other acts of similar nature were shown out of order); *People v. Parrish*, 25 Cal. App. 314, 319, 143 Pac. 546. See *supra*, § 301.

7. See *supra*, § 225.

8. *People v. Dufur*, 34 Cal. App. 644, 168 Pac. 590, holding the error was not prejudicial and could not result in any unfavorable inferences against the defendant, in view of the fact that the copy was identical with the original in defendant's possession, and the offense charged was based upon an entirely different document.

9. *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

10. *People v. Webber*, 44 Cal. App. 120, 186 Pac. 406.

11. See *infra*, § 598.

12. See *infra*, § 603.

13. *People v. Silva*, 20 Cal. App. 121, 128 Pac. 348.

14. See *infra*, § 596.

15. *People v. Castro*, 42 Cal. App. 453, 183 Pac. 828.

16. *People v. Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153. See *supra*, § 80 et seq.

17. *People v. Murback*, 64 Cal. 369, 30 Pac. 608.

where it appears he fully understood and availed himself of his rights in this respect,¹⁸ the rule is otherwise where, as a result of such failure, a defendant without counsel in the trial court did not exercise his right of challenge.¹⁹ Pursuant to the same principle, irregularities in regard to the custody and management of the jury are not grounds for a reversal in the absence of an affirmative showing of prejudice.²⁰

Allowance of challenge for cause.—Since a defendant has no vested right to have any particular juror sit in the trial of his case,¹ any error in allowing a challenge or excusing a juror or jurors is without prejudice where it appears that a fair and impartial jury was obtained.² If it appears that the defendant did not exhaust all of his peremptory challenges, it must be assumed that he was accorded every right to which he was entitled.³

18. *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Goldenson*, 76 Cal. 328, 346, 19 Pac. 161; *People v. Mortier*, 58 Cal. 262.

19. *People v. Moore*, 103 Cal. 508, 37 Pac. 510.

20. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Frost*, 37 Cal. App. 120, 174 Pac. 106 (where there was an improper communication with the jury).

1. See *JURY*.

2. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Searcey*, 121 Cal. 1, 41 L. R. A. 157, 53 Pac. 359; *People v. Durrant*, 116 Cal. 179, 199, 48 Pac. 75; *People v. Murray*, 85 Cal. 350, 24 Pac. 666 (challenge to panel); *People v. Murphy*, 45 Cal. 137; *People v. Arceo*, 32 Cal. 40; *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65, 66 (a defendant "is in no position to complain, either because the court

erroneously rejects a juror challenged for cause, or, acting on its own motion, excuses a juror without just cause"). But see *People v. Owen*, 123 Cal. 482, 56 Pac. 251, in which an order allowing a challenge was reviewed, but where *McFarland, J.*, in concurring, raised the question that the order was not subject to review; *People v. Stewart*, 7 Cal. 140, holding an improper allowance of a challenge by the prosecution is reversible error; and *People v. Schmitz*, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717, 94 Pac. 407, 419 (holding that where the defendant exhausts his peremptory challenges, it must be presumed that the removal of a juror without cause, after they have been sworn, is injurious to his rights, since the effect of such a ruling is to allow the people an additional peremptory challenge). See *supra*, § 524.

3. *People v. Harris*, 31 Cal. App. Dec. 249, 188 Pac. 65.

Peremptory challenge.—It has been held that a refusal to allow a peremptory challenge properly made is reversible error.⁴ But any irregularity in allowing the people to exercise the right of challenge out of regular order, which does not affect a substantial right of the defendant, is not ground for reversal.⁵

§ 595. Errors in Disallowing Challenges for Cause.—The erroneous disallowance of a challenge for cause is harmless if it does not appear that an objectionable juror was forced upon the defendant.⁶ If the defendant had not exhausted his peremptory challenges he cannot complain of the error,⁷ for, if he afterwards peremptorily challenged the objectionable juror, he is not prejudiced;⁸ and if he did not do so, he cannot complain of an error the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it when he had the means and opportunity to do so.⁹ This rule is equally applicable, where the court sustains objections of the district attorney to questions asked of talesmen on their examination on voir dire,¹⁰ and where the prosecution is

4. *People v. Ah You*, 47 Cal. 121; *People v. Jenks*, 24 Cal. 11.

5. *People v. Majors*, 65 Cal. 138, 148, 52 Am. Rep. 295, 3 Pac. 597 (following *People v. McCarthy*, 48 Cal. 557).

6. *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599; *People v. Schafer*, 161 Cal. 573, 119 Pac. 920; *People v. Tinnen*, 32 Cal. App. Dec. 1067, 60 Cal. Dec. 355, 192 Pac. 557.

7. *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Durrant*, 116 Cal. App. 179, 48 Pac. 75; *People v. Patterson*, 102 Cal. 239, 36 Pac. 436; *People v. McGungill*, 41 Cal. 429; *People v. Gaunt*, 23 Cal. 156; *People v. Gatewood*, 20 Cal. 149; *People v. Tinnen*, 32 Cal. App.

Dec. 1067, 60 Cal. Dec. 355, 192 Pac. 557; *People v. Hinshaw*, 40 Cal. App. 672, 182 Pac. 59; *People v. Carroll*, 39 Cal. App. 654, 180 Pac. 49; *People v. Lytle*, 34 Cal. App. 360, 167 Pac. 552; *People v. Perry*, 25 Cal. App. 337, 143 Pac. 798; *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407.

8. *People v. Schafer*, 161 Cal. 573, 119 Pac. 920; *People v. Gatewood*, 20 Cal. 147.

9. *People v. Tyren*, 179 Cal. 575, 178 Pac. 132; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390.

10. *People v. Tyren*, 179 Cal. 575, 178 Pac. 132; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261 (where the juror was peremptorily

allowed to exercise a peremptory challenge after the defendant is called upon to exercise his right of challenge.¹¹ But it is not applicable to a ruling upon a challenge to the panel. In such case the fact that the defendant did not exhaust his peremptory challenges will not prevent a reversal, for the reason that where the disqualification goes to the whole panel, though the defendant exhaust his challenges, he would still be called upon to complete the jury from men all summoned with like illegality.¹²

Where defendant is forced to exhaust peremptory challenges.—The rule, as laid down in the later cases, is that an erroneous disallowance of a challenge for cause is not prejudicial, even though the defendant finally exhausted his peremptory challenges, if it does not appear that he had occasion to or desired to use an additional peremptory challenge, or that the jurors finally accepted were not entirely satisfactory to him.¹³ In the earlier cases there is authority to the contrary.¹⁴ To warrant a reversal it

challenged, and the court afterward permitted the defendant another challenge in addition to the number allowed by law); *People v. Perry*, 25 Cal. App. 337, 143 Pac. 798.

11. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928.

12. *People v. Le Doux*, 155 Cal. 535, 557, 102 Pac. 517 (opinion on denial of rehearing, Angellotti, J., and Sloss, J., dissenting); *People v. Vasquez*, 9 Cal. App. 545, 99 Pac. 982 (not deciding the point).

13. *People v. Kromphold*, 172 Cal. 512, 520, 157 Pac. 599; *People v. Schafer*, 161 Cal. 573, 576, 119 Pac. 920; *People v. Slaughter*, 33 Cal. App. 365, 165 Pac. 44; *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200 (overruling contrary statement on former appeal in 13 Cal. App. 555, 110 Pac. 345).

14. *People v. Helm*, 152 Cal. 532,

93 Pac. 99 (where the court says that the overruling of a challenge for cause is prejudicial if the defendant has been obliged to exhaust his peremptory challenges in relieving himself of jurors who should have been excused by the court; and it makes no difference that no challenges for cause were interposed by the defendant after the exhaustion of his peremptory challenges had been forced upon him; for there may be some reason known to the defendant which would make it most prejudicial to him that the juror be retained, but which is not ground for challenge); *People v. Durrant*, 116 Cal. 179, 48 Pac. 75 (where the court says, by way of dictum, that if the defendant exhausted his peremptory challenges before the completion of the jury, he may well be heard to urge that

must appear that an objectionable juror was forced upon the defendant,¹⁵ and that he in some appropriate manner expressed his dissatisfaction with the jury as completed.¹⁶ Under this rule a defendant who allows a juror challenged for cause to remain, and exercises his remaining challenge upon another juror, is nevertheless entitled to a reversal, as he could not have had the last juror peremptorily challenged if he had peremptorily challenged the juror challenged for cause.¹⁷ It has been said that this rule is clearly in line with section 4½ of article VI of the constitution.¹⁸

§ 596. Misconduct of Court or Judge.—Remarks of a court or judge, although improper, are not ground for reversal when they are not prejudicial to the substantial rights of the defendant.¹⁹ Any error in making improper

by reason of the erroneous ruling the number of his peremptory challenges was improperly curtailed, and he was deprived of a legal right); *People v. Weil*, 40 Cal. 268 (granting a reversal where the defendant exhausted his peremptory challenges, although it did not appear that he attempted any more peremptory challenges or had any desire to exercise any more).

15. *People v. Schafer*, 161 Cal. 573, 119 Pac. 920.

16. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862 (holding that the defendant is entitled to a reversal when he asked the privilege of challenging the objectionable juror and was denied it); *People v. Khair Din*, 39 Cal. App. 695, 179 Pac. 713 (where the defendant after the exhaustion of his peremptory challenges challenged a juror for cause, which was denied); *People v. Harrison*, 18 Cal. App. 288, 123 Pac. 200.

17. *People v. Tinnen*, 60 Cal. Dec.

355, 32 Cal. App. Dec. 1067, 192 Pac. 667 (per opinion of supreme court denying hearing).

18. *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599.

19. *People v. Rogers*, 163 Cal. 476, 483, 126 Pac. 143; *People v. Benc*, 130 Cal. 159, 62 Pac. 404 (remark naturally provoked by incompetent evidence); *People v. McGregar*, 88 Cal. 140, 26 Pac. 97 (a statement by the court of a fact shown by the evidence is harmless, where the evidence without conflict showed the fact to be as stated); *People v. Murphy*, 35 Cal. App. Dec. 618, 200 Pac. 484 (where the court remarked that counsel was upon a "fishing excursion"); *People v. Martin*, 44 Cal. App. 45, 185 Pac. 1003 (a remark after the return of the verdict and discharge of the jury); *People v. Wademan*, 38 Cal. App. 116, 126, 175 Pac. 791 (where the court said the prosecuting witness was not "overly bright"); *People v. Robertson*, 26 Cal. App. 507, 147 Pac. 468;

remarks is generally cured by an instruction to the jury to disregard them, it being presumed that the jury will heed the admonition.²⁰ This rule does not apply, however, to statements which in their very nature are calculated to weaken, if not utterly destroy, a legitimate and substantial defense apparently interposed in good faith.¹ The fact that a remark was not addressed directly to the jury may be considered in determining whether it is prejudicial,² although that fact alone may not warrant a presumption that the jury ignored it. The right of a defendant to a decision on the facts uninfluenced by the opinion of the judge cannot be lawfully denied by any evasion.³ So also the fact that the opinion of the court as to the facts was unintentionally expressed does not tend to lessen its weight with the jury, and a charge to that effect has been held insufficient to efface the prejudicial effect of the opinion.⁴

People v. Ruef, 14 Cal. App. 576, 599, 114 Pac. 48, 54 (utterance of commonplaces and self-evident propositions known to every juror held to be harmless); *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899 (where the court condemned opinions and beliefs adverse to the defendant stated by a witness for the prosecution); *People v. Olsen*, 1 Cal. App. 17, 81 Pac. 676 (where the court said that only one case based upon circumstantial evidence in ten thousand goes wrong).

20. *People v. Lawson*, 178 Cal. 722, 731, 174 Pac. 885; *People v. Watson*, 165 Cal. 645, 653, 133 Pac. 298; *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Northey*, 77 Cal. 618, 630, 19 Pac. 865, 20

Pac. 129; *People v. Giancoli*, 74 Cal. 642, 16 Pac. 510; *People v. Galvin*, 9 Cal. 115; *People v. Fritz*, 36 Cal. App. Dec. 61, 201 Pac. 348; *People v. Riccardi*, 33 Cal. App. Dec. 819, 195 Pac. 448; *People v. Wademan*, 38 Cal. App. 116, 127, 175 Pac. 791; *People v. Terramorse*, 30 Cal. App. 267, 157 Pac. 1134 (where the court made an improper reference to the effect of evidence); *People v. Turner*, 28 Cal. App. 766, 154 Pac. 34; *People v. Robertson*, 26 Cal. App. 507, 147 Pac. 468.

1. *People v. Pitisci*, 29 Cal. App. 727, 736, 157 Pac. 502.

2. *People v. Goodwin*, 132 Cal. 368, 372, 64 Pac. 561; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

3. *People v. Willard*, 92 Cal. 482, 489, 28 Pac. 585; *People v. Pitisci*, 29 Cal. App. 727, 735, 157 Pac. 502.

4. *People v. Pitisci*, 29 Cal. App. 727, 737, 157 Pac. 502.

The action of the trial court in being hasty, impatient, unreasonably arbitrary and in causing humiliation to counsel for the defense, does not, standing alone, justify a reversal, but merely accentuates the effect of other errors disclosed by the record.⁵ Indeed, the degree of courtesy to be exercised by a court toward counsel is not a subject for judicial review, unless it clearly appears to have been prejudicial to the defendant's case.⁶ The same is true with reference to the degree of courtesy to be exercised toward a witness.⁷

§ 597. Verdict.—While a strict adherence to the statutory procedure in the rendition and reception of a verdict is desirable, irregularities which do not affect the substantial rights of the defendant will not justify a reversal.⁸ For example: a failure to call the names of the jurors, while irregular, is not prejudicial if all the jurors are in fact present and declare the verdict.⁹ And a failure or refusal to have the verdict declared before recordation will not justify a reversal if the defendant is not deprived of his right to poll the jury.¹⁰ So also any irregularity in reading a written verdict, and discharging the jury before its recordation is not prejudicial error,¹¹ especially where the defendant waives earlier recordation.¹² A judgment

5. *People v. Murphy*, 35 Cal. App. Dec. 618; *People v. Svendsen*, 25 Cal. App. 1, 142 Pac. 861; *People v. Costa*, 24 Cal. App. 739, 142 Pac. 508.

6. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Szafcsur*, 161 Cal. 636, 119 Pac. 1083; *People v. Hill*, 146 Cal. 142, 79 Pac. 845; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Cramley*, 23 Cal. App. 340, 348, 138 Pac. 123; *People v. Lawlor*, 21 Cal. App. 63, 131 Pac. 63; *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693. See *People v. Baker*, 100

Cal. 188, 38 Am. St. Rep. 276, 34 Pac. 649, holding that censure of counsel for an unnecessary consumption of time was not prejudicial.

7. *People v. Vukojivich*, 25 Cal. App. 459, 143 Pac. 1058.

8. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Gilbert*, 57 Cal. 96.

9. *People v. Rodundo*, 44 Cal. 538.

10. *People v. Nichols*, 62 Cal. 518.

11. *People v. Gilbert*, 57 Cal. 96. See *supra*, § 439.

12. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421.

will be reversed, however, if the jury fails to find upon a plea of former conviction or acquittal,¹³ or when a verdict is returned for an offense not included in the charge. Though such verdict is full and complete so far as any matter of form is concerned, it cannot be construed to be within the charge and upheld on that theory.¹⁴

Evidence.

§ 598. Admission Generally.—Under the constitution, a judgment cannot be reversed because of errors in the admission of evidence where it appears from the whole case that the conviction was just and that there was no miscarriage of justice.¹⁵ If the record discloses the guilt of the defendant beyond a shadow of doubt,¹⁶ or if the court is satisfied that the evidence erroneously admitted in no degree contributed to or affected the verdict,¹⁷ there is no miscarriage of justice warranting a reversal. But if it cannot be determined whether a defendant would or would not have been convicted by the jury had testimony erroneously admitted been kept from their consideration, the judgment will be reversed. If, for example, the evidence of guilt is not positive, direct and certain, or is contradicted by the defendant himself, grave errors in the admission of evidence will work a reversal.¹⁸ Of course it is not necessary, when the improper evidence bears directly upon the commission of the crime, that the defendant be a witness in his own behalf in order to procure a reversal of a case. While it may be true that if he voluntarily takes the stand to deny the commission of the

13. *People v. Fuqua*, 61 Cal. 377.

14. *People v. Arnett*, 126 Cal. 680, 59 Pac. 204.

15. Const., art. VI, § 4½; *People v. Wilkison*, 30 Cal. App. 473, 158 Pac. 1067 (where evidence as to other offenses was introduced); *People v. Dial*, 28 Cal. App. 704, 153 Pac. 970.

16. *People v. Thomas*, 34 Cal. App. Dec. 766, 197 Pac. 677; *People v. Flood*, 41 Cal. App. 373, 182 Pac. 766.

17. *People v. Lapara*, 181 Cal. 66, 72, 183 Pac. 545; *People v. Kizer*, 22 Cal. App. 11, 17, 133 Pac. 516, 521, 134 Pac. 346.

18. *People v. MacPhee*, 26 Cal. App. 218, 146 Pac. 522.

crime and the improper evidence weighs against him as a witness, he may be entitled to a new trial for that reason as well as for the reason the proofs would not be undisputed; if, however, he testifies only to facts not in dispute and immaterial, he cannot complain that the uncontradicted and conclusive proofs of the prosecution compel the application of the constitutional provision.¹⁹

§ 599. Harmless Error in Admission.—A judgment of conviction will not be reversed because of the erroneous admission of evidence which is immaterial and cannot prejudice the cause of a defendant,²⁰ or which has no reference to the defendant and throws no light on the question whether or not he was a participant in the crime,¹ or which is purely abstract.² When matters are improperly made the subject of expert evidence, and the answers are clearly a part of common knowledge, no injury can result therefrom, particularly when correct.³ Error in the admission of evidence is harmless if the evidence neither tends to prove or disprove the charge,⁴ or if it is of no

19. *People v. Powers*, 23 Cal. App. 447, 138 Pac. 373.

20. *People v. Delhantie*, 163 Cal. 461, 125 Pac. 1066 (where evidence to the effect that the deceased was a trouble maker was admitted); *People v. Glaze*, 139 Cal. 154, 161, 72 Pac. 965; *People v. Bishop*, 134 Cal. 682, 66 Pac. 976; *People v. Hill*, 116 Cal. 568, 48 Pac. 711 (holding that the erroneous admission of expert evidence as to the position of the parties was without prejudice); *People v. Fitzpatrick*, 106 Cal. 286, 39 Pac. 605; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Fick*, 89 Cal. 144, 26 Pac. 759; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799 (where the court admitted evidence of other crimes which could not have been regarded by the jury

as tending to prove guilt of the crime charged); *People v. Davis*, 47 Cal. 93; *People v. Matthews*, 6 Cal. Unrep. 341, 58 Pac. 371; *People v. Wilson*, 14 Cal. App. 515, 112 Pac. 579 (opinion of ordinary witness).

1. *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Northcott*, 59 Cal. Dec. 415, 31 Cal. App. Dec. 346, 189 Pac. 704, 708; *People v. Garwood*, 11 Cal. App. 665, 106 Pac. 113; *People v. Stokes*, 5 Cal. App. 205, 213, 89 Pac. 997.

2. *People v. Winters*, 125 Cal. 325, 331, 57 Pac. 1067; *People v. Balmain*, 16 Cal. App. 28, 116 Pac. 303.

3. *People v. Durrant*, 116 Cal. 179, 217, 48 Pac. 75. See *supra*, § 238.

4. *People v. Crespi*, 115 Cal. 50, 46 Pac. 863.

material consequence as affecting the defenses made,⁵ or if the fact proved thereby is undisputed,⁶ or if it is proved by other evidence which is admitted without objection,⁷ or if the fact is proved by the defendant himself,⁸ or is brought out by the defendant on cross-examination of a witness for the prosecution.⁹ For example, a defendant is

5. *People v. Zachary*, 22 Cal. App. 475, 134 Pac. 1005.

6. *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Thomas*, 34 Cal. App. Dec. 766, 197 Pac. 677.

7. *People v. Wolff*, 182 Cal. 728, 190 Pac. 22; *People v. Ong Mon Foo*, 182 Cal. 697, 704, 189 Pac. 690; *People v. Rulia Singh*, 182 Cal. 457, 480, 188 Pac. 987; *People v. Vertrees*, 169 Cal. 404, 146 Pac. 871; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Brittain*, 142 Cal. 8, 100 Am. St. Rep. 95, 75 Pac. 314; *People v. Howard*, 135 Cal. 266, 67 Pac. 148; *People v. Goodwin*, 132 Cal. 68, 64 Pac. 561 (holding that any error in cross-examining a defendant whether certain letters were in his handwriting is harmless where the identity of the letters was fully established before the cross-examination); *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *People v. De Lay*, 80 Cal. 52, 22 Pac. 90; *People v. Rolfe*, 61 Cal. 540; *People v. De Vries*, 35 Cal. App. Dec. 263, 199 Pac. 867; *People v. Velarde*, 31 Cal. App. Dec. 217, 188 Pac. 58; *People v. Desmond*, 24 Cal. App. 408, 413, 141 Pac. 632; *People v. Sanchez*, 23 Cal. App. 743, 139 Pac. 820 (holding that the error is harmless where the fact had already been proved by necessary inference from evidence previously given, and was established without conflict);

People v. Dean, 23 Cal. App. 745, 139 Pac. 904; *People v. Zachary*, 22 Cal. App. 475, 134 Pac. 1005; *People v. Boyd*, 16 Cal. App. 130, 116 Pac. 323; *People v. Mack*, 14 Cal. App. 13, 110 Pac. 967; *People v. Pembroke*, 6 Cal. App. 588, 92 Pac. 668. But see *People v. Oldham*, 111 Cal. 648, 44 Pac. 312, holding that error in the admission of hearsay evidence is not cured by calling the witness whose statements were introduced and having him in court make substantially the same statements.

8. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678; *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353; *People v. Daniels*, 70 Cal. 521, 11 Pac. 655; *People v. Marsailer*, 70 Cal. 100, 11 Pac. 503; *People v. Montgomery*, 53 Cal. 576; *People v. Kruvosky*, 35 Cal. App. Dec. 824, 200 Pac. 831; *People v. Healey*, 35 Cal. App. Dec. 122, 199 Pac. 551; *People v. Stockton*, 33 Cal. App. 467, 165 Pac. 717; *People v. Burrows*, 27 Cal. App. 428, 150 Pac. 382; *People v. Walker*, 26 Cal. App. 47, 146 Pac. 65; *People v. McAlpine*, 25 Cal. App. 727, 145 Pac. 152; *People v. Powers*, 23 Cal. App. 447, 138 Pac. 373; *People v. Zachary*, 22 Cal. App. 475, 134 Pac. 1005; *People v. Kizer*, 22 Cal. App. 10, 133 Pac. 516, 521, 134 Pac. 346.

9. *People v. Dollor*, 89 Cal. 513, 26 Pac. 1086 (holding that a refusal

not prejudiced by the admission in evidence of an involuntary confession,¹⁰ or by a ruling against objection permitting his wife to testify against him, if he voluntarily becomes a witness and testifies to the same effect.¹¹ So also any error in taking judicial notice of a fact is harmless if it is proved by evidence admitted without objection and not stricken out.¹² It has been said in reference to the curative effect of the act of the defendant that it is doubtful if error in the admission of evidence is rendered harmless by the mere fact that the defendant introduces evidence in conflict with that of the prosecution. The test as to the curative effect of the act of the defendant in testifying to the same transaction is not with reference to the confirmatory character, but as to whether or not the evidence so introduced by the defendant covered the same field and scope as that offered by the people and objected to.¹³ Whether or not the introduction of improper matter into a case by a defendant justifies a court in permitting a district attorney in pursuing the same line of examination on cross or redirect examination, the fact that the defendant has already called the same matter to the attention of the jury will be considered in determining whether the action of the district attorney is prejudicial to the defendant.¹⁴

Although it has been said that judges are not justified in admitting evidence over objection and exception and

to strike out a statement of a witness that the defendant had been convicted of a felony is immaterial if the witness says the same thing on his cross-examination by defendant's counsel without any objection being made to it).

10. *People v. Stockton*, 33 Cal. App. 467, 165 Pac. 717; *People v. Walker*, 26 Cal. App. 47, 146 Pac. 65; *People v. Zachary*, 22 Cal. App. 475, 134 Pac. 1005.

11. *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353.

12. *People v. Mueller*, 168 Cal. 526, 143 Pac. 750; *People v. Chin Hane*, 108 Cal. 597, 602, 41 Pac. 697.

13. *People v. Kizer*, 22 Cal. App. 10, 16, 22, 133 Pac. 516, 521, 134 Pac. 346 (per supreme court denying a rehearing).

14. *People v. McKeehan*, 11 Cal. App. 443, 105 Pac. 273.

then, after the case has been argued, instructing the jury not to consider it in making up their verdict,¹⁵ the rule is nevertheless well established that under any ordinary circumstances the admission of improper evidence is harmless if it is subsequently stricken out and the jury is told to disregard it. Where they are so instructed it will be presumed they obeyed the instruction.¹⁶ So also an error in overruling an objection to a question is harmless if the question is not answered,¹⁷ or if the answer is favorable to the defendant.¹⁸ If a witness answers questions in direct disobedience to an order of the court holding the testimony improper, it will be presumed the jury disregarded the testimony.¹⁹

15. *People v. Oldham*, 111 Cal. 648, 44 Pac. 312.

16. *People v. Prather*, 134 Cal. 436, 66 Pac. 483, 724; *People v. Rodriguez*, 134 Cal. 140, 66 Pac. 174 (but holding that evidence that the defendant was confined in the county jail is not cured by striking it out); *People v. Turner*, 118 Cal. 324, 50 Pac. 537; *People v. Shaver*, 120 Cal. 354, 52 Pac. 651; *People v. Barney*, 114 Cal. 554, 47 Pac. 41; *People v. Borda*, 105 Cal. 636, 38 Pac. 1110; *People v. French*, 69 Cal. 169, 173, 10 Pac. 378; *People v. Majors*, 65 Cal. 138, 149, 52 Am. Rep. 295, 3 Pac. 597; *People v. Hoy Yen*, 34 Cal. 176; *People v. Malley*, 33 Cal. App. Dec. 346, 194 Pac. 48; *People v. Tanner*, 36 Cal. App. 20, 171 Pac. 439; *People v. Terramorse*, 30 Cal. App. 267, 157 Pac. 1134; *People v. Todd*, 26 Cal. App. 291, 146 Pac. 899; *People v. Perry*, 25 Cal. App. 337, 143 Pac. 798; *People v. Herges*, 14 Cal. App. 273, 111 Pac. 624; *People v. McCarthy*, 14 Cal. App. 148, 111 Pac. 274; *People*

v. Cyty, 11 Cal. App. 702, 706, 106 Pac. 257; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654. See *People v. Wallace*, 89 Cal. 158, 167, 26 Pac. 650, holding that the instruction given was not equivalent to an instruction to disregard the evidence. See, also, *People v. Costa*, 24 Cal. App. 739, 142 Pac. 508, holding that the error was not cured where the evidence was not ordered stricken out until argument began when the court casually remarked: "I think the testimony of Mr. C. should be stricken out."

17. *People v. Dennis*, 39 Cal. 624, 634; *People v. Lavery*, 9 Cal. App. 756, 100 Pac. 899; *People v. Maltais*, 7 Cal. App. 120, 93 Pac. 890.

18. *People v. Wynn*, 133 Cal. 72, 65 Pac. 126; *People v. Plummer*, 12 Cal. 256; *People v. Ho Kim You*, 24 Cal. App. 451, 465, 141 Pac. 950; *People v. Desmond*, 24 Cal. App. 408, 141 Pac. 632; *People v. Burke*, 18 Cal. App. 72, 89, 122 Pac. 435. See *infra*, § 605.

19. *People v. Hall*, 57 Cal. 569.

§ 600. Exclusion of Evidence.—A judgment will not be reversed because of the exclusion of evidence which is too remote to give it any substantial value, or is otherwise unimportant,²⁰ or which could not have affected the verdict,¹ or had no bearing on the case.² So also the exclusion of evidence in rebuttal of a specific intent is harmless when the defendant is found guilty of a lesser offense of which such intent is not an element.³ Since the direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact, except perjury or treason,⁴ the exclusion of evidence is harmless if the fact to be proved thereby has been proved by the uncontradicted evidence of another witness.⁵ So also it is not prejudicial error to exclude evidence if the same testimony was previously or is afterwards admitted without objection, or if it is cumulative to other evidence introduced.⁶ For example, error in refusing to permit a witness to an-

20. *People v. Barthleman*, 120 Cal. 7, 15, 52 Pac. 112.

1. *People v. Clark*, 106 Cal. 41, 39 Pac. 53; *People v. Stokes*, 5 Cal. App. 205, 213, 89 Pac. 997.

2. *People v. Nihell*, 144 Cal. 200, 77 Pac. 916.

3. *People v. Canti*, 17 Cal. App. 771, 788, 122 Pac. 450, 457 (by the supreme court in denying a rehearing).

4. Code Civ. Proc., § 1844. See *supra*, § 251.

5. *People v. Westlake*, 62 Cal. 303, 310; *People v. Reed*, 48 Cal. 553; *People v. Hunt*, 26 Cal. App. 514, 147 Pac. 476; *People v. Lopez*, 42 Cal. App. 369, 183 Pac. 674.

6. *People v. Ochoa*, 142 Cal. 268, 75 Pac. 847; *People v. Plyler*, 126 Cal. 379, 382, 58 Pac. 904; *People v. Barthleman*, 120 Cal. 7, 15, 52 Pac. 112; *People v. Arnold*, 116 Cal. 682, 48 Pac. 803; *People v. Sehorn*, 116 Cal. 503, 511, 48 Pac.

495; *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500; *People v. Salorse*, 62 Cal. 139, 145; *People v. Morine*, 61 Cal. 367; *People v. Woody*, 48 Cal. 80; *People v. Henderson*, 28 Cal. 465; *People v. Eaton*, 6 Cal. Unrep. 906, 68 Pac. 583; *People v. Gilmore*, 6 Cal. Unrep. 57, 53 Pac. 806; *People v. McSweeney*, 4 Cal. Unrep. 924, 38 Pac. 743; *People v. Kepford*, 35 Cal. App. Dec. 96, 199 Pac. 64; *People v. Stennett*, 34 Cal. App. Dec. 501, 197 Pac. 372; *People v. Dad*, 34 Cal. App. Dec. 377, 196 Pac. 506; *People v. Martin*, 33 Cal. App. Dec. 557, 194 Pac. 522; *People v. Peck*, 43 Cal. App. 638, 185 Pac. 881; *People v. Richard*, 39 Cal. App. 779, 180 Pac. 50; *People v. Ronasse*, 26 Cal. App. 100, 146 Pac. 65; *People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756; *People v. Izlar*, 8 Cal. App. 600, 97 Pac. 685.

swer a question is harmless if later without objection he testifies fully in regard to the matter.⁷ So also any error in confining impeaching testimony to the reputation of a witness for truth and veracity is harmless where by direct evidence of a specific act of dishonesty his lack of integrity is shown.⁸ The appellate court cannot say as a matter of law that a defendant should be barred from attempting to prove his defense unless it is clearly impossible to make such proof, and so it has been held that a refusal to allow a defendant to introduce evidence of a defense is reversible error though his ability to establish it may seem to be highly improbable.⁹

§ 601. Want of Corroboration of Accomplice.—Where the testimony of an alleged accomplice is given and the defendant is found guilty under instructions relating to the necessity of corroboration, it is clear that the jury must have concluded that there was corroborating evidence connecting the defendant with the crime, independent of that of the accomplice, or that the alleged accomplice was not in fact an accomplice. While a verdict will be set aside if the required corroboration is wanting,¹⁰ before a court can do so it must appear without substantial conflict in the evidence that the alleged accomplice furnishing such proof was in fact an accomplice. Where there is a conflict on the question it will be presumed in aid of the verdict that the jury found that the witness was not an accomplice.¹¹

7. *People v. Tyren*, 179 Cal. 575, 178 Pac. 132; *People v. Watson*, 165 Cal. 645, 133 Pac. 298 (where the facts were brought out on cross-examination); *People v. Ross*, 115 Cal. 233, 46 Pac. 1059; *People v. Howard*, 112 Cal. 135, 44 Pac. 464.

8. *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

9. *People v. Blake*, 65 Cal. 275, 4

Pac. 1 (where the court refused to allow evidence of intoxication and where the crime charged depended upon a specific intent).

10. *People v. Koenig*, 99 Cal. 574, 34 Pac. 238; *People v. Ames*, 39 Cal. 403; *People v. Sciaroni*, 4 Cal. App. 698, 89 Pac. 133.

11. *People v. Compton*, 123 Cal. 403, 407, 56 Pac. 44; *People v.*

Misconduct of Prosecuting Attorney.

§ 602. **In General.**—Courts are strongly inclined against setting aside convictions upon the ground of misconduct of district attorneys alone.¹² Such misconduct, therefore, is not ground for a reversal when it is unimportant or slight,¹³ or when it cannot prejudice the defendant,¹⁴ or when it appears that the verdict could not have been controlled or affected by it,¹⁵ as where the evidence is such that it is inconceivable that any honest jury could have found any other verdict in the absence of any dereliction on the part of the district attorney.¹⁶ A judgment will

Creegan, 121 Cal. 554, 53 Pac. 1082; People v. Bolanger, 71 Cal. 17, 11 Pac. 799; People v. Watson, 21 Cal. App. 692, 695, 132 Pac. 836; People v. Bunkers, 2 Cal. App. 197, 203, 84 Pac. 364, 370.

12. People v. Derwae, 155 Cal. 592, 102 Pac. 266; People v. Lee Chuck, 78 Cal. 317, 329, 20 Pac. 719.

13. People v. Shaw, 111 Cal. 171, 43 Pac. 593; People v. Ross, 85 Cal. 383, 24 Pac. 789 (where the defendant declined to argue the case and the district attorney said he was endeavoring to prevent the prosecution from arguing the truth of the charge); People v. Wheeler, 65 Cal. 77, 2 Pac. 892 (a statement addressed to the defendant personally, "You sought this trouble with him [the prosecuting witness] and made a cowardly attack upon him," does not justify a reversal); People v. De Angelli, 34 Cal. App. 716, 168 Pac. 699 (where counsel said the defendant was able to testify without an interpreter); People v. Smith, 23 Cal. App. 382, 138 Pac. 107; People v. Saunders, 13 Cal. App. 743, 110 Pac. 825 (a remark that it is the object of the prosecu-

tion to degrade the character of the defendant as it goes along is not ground for reversal); People v. Fitts, 4 Cal. App. 432, 91 Pac. 536.

14. People v. Willard, 150 Cal. 543, 89 Pac. 124; People v. McMahon, 124 Cal. 435, 57 Pac. 224; People v. Yokum, 118 Cal. 437, 50 Pac. 686; People v. Hamberg, 84 Cal. 468, 24 Pac. 298 (where the prosecuting attorney stated that he was biased against the defendant); People v. William Yee, 37 Cal. App. 579, 174 Pac. 343 (a reference to facts not in evidence as showing motive is harmless where the crime is brought home to the accused and motive becomes unimportant); People v. Charlie, 34 Cal. App. 411, 416, 167 Pac. 703; People v. Cherry, 30 Cal. App. 286, 158 Pac. 335 (where counsel referred to the fact the defendant's wife, a witness, was under arrest and out on bail); People v. Mallicoat, 27 Cal. App. 355, 149 Pac. 1000.

15. People v. Danford, 14 Cal. App. 442, 452, 112 Pac. 474; People v. McRoberts, 1 Cal. App. 25, 28, 81 Pac. 734, 735.

16. People v. Amer, 8 Cal. App. 137, 96 Pac. 401 (where a reference

not be reversed because of the misconduct of the district attorney except in clear¹⁷ and extreme cases,¹⁸ and unless the misconduct is flagrant and obviously prejudicial,¹⁹ and unless, in the opinion of the appellate court from a review of the entire record, it results in a miscarriage of justice.²⁰ Counsel's conduct must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in a criminal case before error can be predicated upon it. There must be willful error persisted in for an illegitimate purpose, followed by injustice to the prisoner.¹ Each case must be judged by its own particular circumstances.² And much must be left to the discretion of the trial court in determining whether an attorney overstepped the bounds of legal propriety in his conduct of the trial, and its judgment that counsel's conduct wrought no prejudice will not be set aside unless the contrary clearly appears.³ While allowance will be made for the zeal of the prosecution of the case,⁴ the courts will not tolerate such flagrant

was made to the failure of the defendant to testify).

17. *People v. Yee Foo*, 4 Cal. App. 730, 740, 89 Pac. 450.

18. *People v. Perry*, 144 Cal. 748, 753, 78 Pac. 284.

19. *People v. Avena*, 34 Cal. App. 500, 168 Pac. 148; *People v. Finali*, 31 Cal. 479, 490, 160 Pac. 850.

20. *People v. Derwae*, 155 Cal. 593, 102 Pac. 266; *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891; *People v. Hail*, 25 Cal. App. 342, 363, 143 Pac. 803; *People v. Keko*, 27 Cal. App. 351, 149 Pac. 1003 (reversing the judgment where the evidence, although sufficient to support the judgment, was not so far conclusive that the judgment should be sustained in the face of misconduct depriving the defendant of a sub-

stantial right); *People v. Grider*, 13 Cal. App. 703, 714, 110 Pac. 586.

1. *People v. Putman*, 129 Cal. 258, 61 Pac. 961; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Ruef*, 14 Cal. App. 576, 619, 114 Pac. 48, 54.

2. *People v. Ruef*, 14 Cal. App. 576, 619, 114 Pac. 48, 54.

3. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

4. *People v. Warner*, 147 Cal. 546, 82 Pac. 196; *People v. Owens*, 132 Cal. 469, 64 Pac. 770 (stating that mere fervor of the district attorney will not warrant a reversal); *People v. Ryan*, 108 Cal. 581, 585, 41 Pac. 451; *People v. Burke*, 18 Cal. App. 72, 102, 122 Pac. 435.

or repeated violations as deny the defendant his right to a fair trial.⁵

A judgment will not be reversed because of personal references to counsel for the defense which cannot prejudice the defendant,⁶ or because the district attorney makes unauthorized experiments with exhibits,⁷ or because he makes an inadvertent reference to an alias of the defendant.⁸ The recollection of the jury is usually a sufficient protection to an accused against any misrepresentation of the testimony.⁹ In this connection it has been said that it must be a very exceptional case in which a reversal will be ordered by reason of the character of the opening statement of the prosecuting officer.¹⁰

§ 603. Cure of Error by Instructions or Retraction.—

It is the rule generally that misconduct of the district attorney intended and likely to result in prejudice will not suffice to justify the granting a new trial if upon the whole case it can be said that the possible effect thereof was subsequently removed by a proper admonition of the trial court to the jury.¹¹ There may be cases where the act

5. *People v. De Vries*, 35 Cal. App. Dec. 263, 199 Pac. 867.

6. *People v. Patterson*, 124 Cal. 102, 56 Pac. 882; *People v. Amadio*, 25 Cal. App. 729, 145 Pac. 151.

7. *People v. Carson*, 32 Cal. App. Dec. 1051, 192 Pac. 318.

8. *People v. Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652.

9. *People v. Craig*, 152 Cal. 42, 91 Pac. 997; *People v. Barnhart*, 59 Cal. 381, 402; *People v. Davis*, 26 Cal. App. 647, 147 Pac. 1184.

10. *People v. Sing Yow*, 145 Cal. 1, 9, 78 Pac. 235.

11. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Ong Mon Foo*, 182 Cal. 697, 189 Pac. 690; *People v. Beggs*, 178 Cal. 79, 91,

172 Pac. 152; *People v. Couture*, 171 Cal. 43, 151 Pac. 659; *People v. Swearingen*, 168 Cal. 53, 141 Pac. 822; *People v. Luis*, 158 Cal. 185, 196, 110 Pac. 580; *People v. Willard*, 150 Cal. 543, 89 Pac. 124; *People v. Perry*, 144 Cal. 748, 78 Pac. 284 (where a reference to a prior conviction was made); *People v. Brittain*, 142 Cal. 8, 100 Am. St. Rep. 95, 75 Pac. 314; *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *People v. Smith*, 134 Cal. 453, 457, 66 Pac. 669 (where the court also rebuked the district attorney); *People v. Ward*, 134 Cal. 301, 312, 66 Pac. 372; *People v. Bene*, 130 Cal. 159, 62 Pac. 404; *People v. Putman*, 129 Cal. 258, 61 Pac. 961; *People v.*

done or remark made is of such a character that a harmful result cannot be obviated by any retraction or instruction. In such cases, the misconduct will furnish ground for reversal, even though the trial court may have taken immediate steps to correct any impression improperly conveyed to the jury.¹² If a case is closely balanced or if there is

Vann, 129 Cal. 118, 61 Pac. 776 (where the district attorney requested bystanders to retire while the prosecuting witness testified); People v. Barthleman, 120 Cal. 716, 52 Pac. 112 (where a reference to extraneous matters was made); People v. Kamaunu, 110 Cal. 609, 42 Pac. 1090; People v. Lee Ah Yute, 60 Cal. 95; People v. Bracklis, 35 Cal. App. Dec. 901, 903, 200 Pac. 1062; People v. Saenz, 33 Cal. App. Dec. 805, 195 Pac. 442; People v. Zentgraf, 33 Cal. App. Dec. 190, 193 Pac. 274; People v. Graham, 32 Cal. App. Dec. 872, 192 Pac. 123; People v. Ciulla, 44 Cal. App. 719, 187 Pac. 46; People v. Rose, 38 Cal. App. 493, 176 Pac. 694; People v. Rossi, 37 Cal. App. 778, 174 Pac. 916; People v. Wilson, 36 Cal. App. 589, 599, 172 Pac. 1116; People v. Pedone, 35 Cal. App. 452, 170 Pac. 170; People v. Lee, 34 Cal. App. 702, 168 Pac. 694; People v. Avena, 34 Cal. App. 500, 168 Pac. 148; People v. Fodera, 33 Cal. App. 8, 13, 164 Pac. 22; People v. Peebles, 32 Cal. App. 279, 162 Pac. 653; People v. Cornell, 29 Cal. App. 430, 437, 155 Pac. 1026; People v. Dye, 29 Cal. App. 169, 182, 154 Pac. 875; People v. Turner, 28 Cal. App. 766, 154 Pac. 34; People v. Townsend, 28 Cal. App. 204, 151 Pac. 745; People v. Kelly, 28 Cal. App. 46, 151 Pac. 295; People v. Clayberg, 26 Cal. App. 614, 147 Pac. 994; People v. Clapp, 26 Cal. App. 523, 147 Pac. 469; People v. Valenzuela, 26 Cal. App. 418, 147 Pac. 97; People v. Tominaga, 26 Cal. App. 295, 146 Pac. 898; People v. Ho Kim You, 24 Cal. App. 451, 467, 141 Pac. 950; People v. Rader, 24 Cal. App. 477, 483, 141 Pac. 958; People v. Ong Git, 23 Cal. App. 148, 137 Pac. 283; People v. Mancuso, 23 Cal. 146, 137 Pac. 278; People v. Watson, 21 Cal. App. 692, 132 Pac. 836; People v. Burke, 18 Cal. App. 72, 102, 122 Pac. 435; People v. Mendoza, 17 Cal. App. 157, 118 Pac. 964; People v. McNabb, 17 Cal. App. 154, 118 Pac. 945; People v. Overacker, 15 Cal. App. 620, 115 Pac. 756; People v. Kerr, 15 Cal. App. 273, 114 Pac. 584; People v. Ruef, 74 Cal. App. 576, 618, 114 Pac. 48, 54; People v. Herges, 14 Cal. App. 273, 111 Pac. 624; People v. Lapigue, 10 Cal. App. 669, 103 Pac. 164 (where a reference to a previous conviction of crime was made); People v. Botkin, 9 Cal. App. 244, 256, 98 Pac. 861; People v. Amer, 8 Cal. App. 137, 142, 96 Pac. 401; People v. Quimby, 6 Cal. App. 482, 92 Pac. 493; People v. White, 5 Cal. App. 329, 336, 90 Pac. 471; People v. Salas, 2 Cal. App. 537, 84 Pac. 295.

12. People v. MacDonald, 167 Cal. 545, 551, 140 Pac. 256; People v. Derwae, 155 Cal. 592, 102 Pac. 266; People v. Derbert, 138 Cal. 467, 71 Pac. 564; People v. Ah Len, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286 (a reference to matters dehors

grave doubt of the defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict, despite the instructions of the court to the effect that the verdict must be based upon the testimony, a miscarriage of justice results, requiring a reversal.¹³ A mere rebuke of counsel may not cure an error in referring to matters *dehors* the record.¹⁴ And an unemphatic instruction may not suffice to correct the error.¹⁵

While it has been held that an instruction to disregard misconduct will not remove the harmful effect of an improper comment, upon the failure of a defendant to testify,¹⁶ such a comment will not, under the constitution, justify a reversal unless it can be said there was a miscarriage of justice.¹⁷

Retraction.—Except under extreme and unusual circumstances, the prompt retraction of the district attorney will remove the prejudicial effect caused by improper

the record is not cured by an admonition of the court when counsel immediately afterwards reiterates the truth of the statement); *People v. Bowers*, 79 Cal. 415, 21 Pac. 752; *People v. Quimby*, 6 Cal. App. 482, 491, 92 Pac. 493.

13. *People v. Fleming*, 166 Cal. 357, Ann. Cas. 1915B, 881, 136 Pac. 291; *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891; *People v. Kilfoil*, 27 Cal. App. 29, 34, 148 Pac. 812; *People v. Ho Kim You*, 24 Cal. App. 451, 467, 141 Pac. 950.

14. *People v. Valliere*, 127 Cal. 65, 59 Pac. 295.

15. *People v. Hill*, 36 Cal. App. 574, 172 Pac. 1114.

16. *People v. Kizer*, 22 Cal. App. 11, 20, 133 Pac. 516, 521, 134 Pac.

346; *People v. Wright*, 4 Cal. App. 706, 89 Pac. 364; *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463. But see *People v. Hatch*, 163 Cal. 368, 381, 125 Pac. 907 (holding that a remark in a discussion with the court to the effect that the defendant could testify to a certain matter was cured by an admonition to the jury).

17. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92; *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Finali*, 31 Cal. App. 479, 491, 160 Pac. 850; *People v. Kizer*, 22 Cal. App. 11, 20, 133 Pac. 516, 521, 134 Pac. 346; *People v. Higgins*, 9 Cal. App. 267, 98 Pac. 683; *People v. Amer*, 8 Cal. App. 137, 96 Pac. 401.

remarks,¹⁸ especially where the court also admonishes the jury to disregard them.¹⁹

§ 604. Improper Questioning.—Misconduct of the district attorney in asking improper questions is ground for reversal when it results in a miscarriage of justice,²⁰ but not otherwise.¹ Ordinarily the sustaining of an objection to an improper question is a sufficient disposition of the matter,² especially when the jury is also instructed to disregard the question.³ But where the offense is repeated in various forms, and it would be impossible for the jury to believe that the district attorney would ask such questions without any information whatever upon which to predicate them, the prejudicial effect is not removed by an instruction to the jury to disregard them. In that case, under the constitution a reversal will be granted if it appears that a miscarriage of justice resulted, as, for example, where the evidence is evenly balanced.⁴

18. *People v. Raber*, 168 Cal. 316, 143 Pac. 317; *People v. Patterson*, 124 Cal. 102, 56 Pac. 882; *People v. Bracklis*, 35 Cal. App. Dec. 901, 200 Pac. 1062; *People v. Kepford*, 35 Cal. App. Dec. 96, 199 Pac. 64; *People v. Lee*, 34 Cal. App. 702, 168 Pac. 694; *People v. Ernsting*, 14 Cal. App. 708, 112 Pac. 913.

19. *People v. Peeples*, 32 Cal. App. 279, 162 Pac. 653; *People v. Davenport*, 17 Cal. App. 557, 120 Pac. 451; *People v. Lewis*, 12 Cal. App. 141, 106 Pac. 890.

20. *People v. McGee*, 24 Cal. App. 563, 141 Pac. 1055.

1. *People v. Phelan*, 123 Cal. 551, 569, 56 Pac. 424; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 67.

2. *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497; *People v. Glaze*, 139 Cal. 154, 159, 72 Pac. 965; *Peo-*

ple v. Williams, 24 Cal. App. 646, 142 Pac. 124.

3. *People v. Anthony*, 185 Cal. 152, 196 Pac. 47; *People v. Couture*, 171 Cal. 46, 151 Pac. 569; *People v. Loomis*, 170 Cal. 347, 149 Pac. 581; *People v. Akey*, 163 Cal. 54, 124 Pac. 718; *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497; *People v. Peete*, 36 Cal. App. Dec. 261, 202 Pac. 51, 67; *People v. Bernon*, 29 Cal. App. 424, 155 Pac. 1021.

4. *People v. Anthony*, 185 Cal. 152, 196 Pac. 47; *People v. Mohr*, 157 Cal. 732, 109 Pac. 476; *People v. Derwae*, 155 Cal. 592, 102 Pac. 266; *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497; *People v. Patterson*, 124 Cal. 102, 56 Pac. 882; *People v. Wells*, 100 Cal. 459, 34 Pac. 1078; *People v. Mullings*, 83 Cal. 138, 145, 17 Am. St. Rep. 223, 23

It has been suggested that in the latter case it will not be presumed that the jury were influenced by the improper conduct unless extraordinary circumstances appear from the record tending to show that such influence existed notwithstanding the caution of the court.⁵ The asking of a single improper question will justify a reversal if the action of the court was such as to accentuate the error and a miscarriage of justice resulted.⁶

§ 605. Effect of Good Faith of Counsel—Effect of Answers.—The good faith of the district attorney in asking questions upon a debatable ground is always an element to be considered. A defendant cannot complain of the mere asking of such questions when an objection thereto is sustained.⁷ But there are certain elementary rules of evidence so clearly established, and fundamental rights of persons charged with crime so generally recognized, that any infraction or invasion of them cannot be justified or excused on the ground of ignorance or good faith.⁸ The good faith of the district attorney in asking a question

Pac. 229; *People v. Edgar*, 34 Cal. App. 459, 167 Pac. 891; *People v. Terramorse*, 30 Cal. App. 267, 157 Pac. 1134; *People v. Pang Sui Lin*, 15 Cal. App. 260, 114 Pac. 582; *People v. Grider*, 13 Cal. App. 703, 712, 110 Pac. 586.

5. *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497 (per Shaw, J., concurring); approved in *People v. Amer*, 8 Cal. App. 137, 142, 96 Pac. 401.

6. When the objection is made upon several grounds including an assignment of misconduct, a ruling which makes no allusion to the misconduct, by implication at least, is a ruling that the action was not misconduct. *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441.

7. *People v. Anthony*, 185 Cal.

152, 196 Pac. 47; *People v. Allen*, 166 Cal. 723, 137 Pac. 1148; *People v. Glaze*, 139 Cal. 154, 159, 72 Pac. 965; *People v. Burns*, 121 Cal. 529, 53 Pac. 1096 (whether the asking of questions of a character witness hinting at former delinquencies of the defendant constitutes misconduct depends upon the good faith of the district attorney); *People v. Pang Sui Lin*, 15 Cal. App. 260, 114 Pac. 582; *People v. Smith*, 13 Cal. App. 627, 110 Pac. 333.

8. *People v. McGee*, 24 Cal. App. 563, 141 Pac. 1055 (granting a reversal although the district attorney was acting in good faith and the evidence was sufficient to sustain the verdict); *People v. Pang Sui Lin*, 15 Cal. App. 260, 114 Pac. 582..

that is clearly improper does not necessarily take away its prejudicial effect. The real test in the latter case is: Has the defendant had a fair trial?⁹

Effect of answers.—Although prior to the adoption of the constitutional amendment altering the test of determining error in the review of cases on appeal, there were some inconsistent holdings,¹⁰ it is now a general rule that an answer to an improper question that is favorable to the defendant is a complete reply to a claim of prejudicial error in the allowing of the question.¹¹ This is especially true when the jury is instructed to disregard matters outside the evidence, for it must be presumed that the jury knew and understood that the mere asking of questions did not constitute evidence.¹² Although such instructions may not be as emphatic as desired, they will ordinarily be deemed sufficient to cure the misconduct if made immediately following the sustaining of an objection which fully states the reasons therefor.¹³

Instructions.

§ 606. **In General.**—While formerly an erroneous instruction was presumed to be injurious unless the contrary clearly appeared,¹⁴ under the present state of the California law, a judgment will not be reversed because

9. *People v. Anthony*, 185 Cal. 152, 196 Pac. 47.

10. See *supra*, § 590; *People v. Un Dong*, 106 Cal. 84, 39 Pac. 12.

11. *People v. Mohr*, 157 Cal. 733, 109 Pac. 476; *People v. Anthony*, 146 Cal. 124, 127, 79 Pac. 858; *People v. Majoine*, 144 Cal. 303, 77 Pac. 952; *People v. Wynn*, 133 Cal. 72, 65 Pac. 126; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *People v. Brown*, 76 Cal. 573, 18 Pac. 678; *People v. Keefer*, 65 Cal. 232, 3 Pac. 818; *People v. Carleton*, 2 Cal.

Unrep. 381, 4 Pac. 763; *People v. Ho Kim You*, 24 Cal. App. 451, 465, 141 Pac. 950; *People v. Burke*, 18 Cal. App. 72, 89, 122 Pac. 435; *People v. Maughs*, 8 Cal. App. 107, 123, 96 Pac. 407.

12. *People v. Ho Kim You*, 24 Cal. App. 451, 465, 141 Pac. 950.

13. *People v. Nakis*, 184 Cal. 105, 193 Pac. 92.

14. *People v. Richards*, 136 Cal. 127, 68 Pac. 477; *People v. Murphy*, 47 Cal. 103. See *supra*, § 590.

of an error in misdirecting the jury, unless in the opinion of the appellate court, after an examination of the entire case, the error resulted in a miscarriage of justice.¹⁵ Hence, a judgment will not be reversed because of an error in instructions if the error can in no way prejudice the rights of the defendant,¹⁶ if it appears that the result would have been the same if the erroneous instruction had not been given,¹⁷ or if the error was cured by the evidence,¹⁸ or by other instructions,¹⁹ or by the verdict.²⁰ Instructions which are calculated to mislead the jury under the circumstances of the case are erroneous and require a reversal, if they result in a miscarriage of justice.¹ But mere uncertainty or lack of perspicuity which cannot have the effect of misleading the jury will not authorize a reversal,² especially when the uncertainty is removed by other instructions.³ While an inapplicable instruction correct in the abstract, is not ground for reversal, when it can do no harm,⁴ the giving of such an instruction con-

15. *People v. Fealy*, 33 Cal. App. 605, 165 Pac. 1034; *People v. Wong Hing*, 28 Cal. App. 230, 239, 151 Pac. 1159.

16. *People v. Taylor*, 1 Cal. Unrep. 19; *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021 (where the court instructed the jury that they may find for the defendant upon the testimony of one witness against the testimony of a greater number); *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People v. Zarate*, 36 Cal. App. Dec. 250, 201 Pac. 955 (a fragmentary definition of "confession" held not prejudicial); *People v. Russell*, 19 Cal. App. 751, 127 Pac. 829 (instruction as to word "willfully"); *People v. Khan*, 41 Cal. App. 393, 182 Pac. 803.

17. *People v. Salorse*, 62 Cal. 139; *People v. Taggart*, 1 Cal. App. 423, 82 Pac. 396.

18. See *infra*, § 609.

19. *People v. Trebilcox*, 149 Cal. 307, 86 Pac. 684; *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *People v. Dennis*, 39 Cal. 625, 637; *People v. Fredoni*, 12 Cal. App. 685, 108 Pac. 663. See *infra*, § 607.

20. See *infra*, § 609.

1. *People v. Munn*, 65 Cal. 211, 3 Pac. 650 (as to presumption of intention to commit all possible consequences of an act).

2. *People v. Ah Loy*, 57 Cal. 566; *People v. Hurley*, 57 Cal. 145; *People v. Moore*, 8 Cal. 90, 94; *People v. Lockhard*, 1 Cal. Unrep. 219.

3. *People v. De Graaf*, 127 Cal. 676, 60 Pac. 429; *People v. Carantan*, 11 Cal. App. 561, 105 Pac. 768. See *infra*, § 607.

4. *People v. Tyren*, 179 Cal. 575, 178 Pac. 132; *People v. Lawson*, 178 Cal. 722, 730, 174 Pac. 885; *People*

stitutes as grave an error as though it were not correct if it is liable to mislead the jury to the prejudice of the defendant.⁵ A statement of circumstances not appearing in evidence simply by way of illustration which cannot have any prejudicial effect is not ground for reversal.⁶

An oral charge not taken down by the reporter as required by the statute will not require a reversal if it appears that what was said was unimportant and did not in any way affect the charge properly given.⁷

Instructions invading province of jury.—No more importance should be attached to an error in invading the province of the jury in violation of the constitutional prohibition than any other. If no injury could possibly have resulted from it, it will not be held to vitiate the judgment.⁸ If the effect of the instruction is withdrawn in another part of the charge, the error is harmless.⁹

Where instructions are refused.—The failure of a trial court to charge, at the request of a defendant, upon any matter of law applicable to the facts of the case, is tantamount to a misdirection of the jury.¹⁰ But a reversal because of the refusal of an instruction is justified only when it appears that it was the duty to give the instructions exactly as requested. If any part of the instruction

v. Romero, 143 Cal. 458, 77 Pac. 163; People v. Methewer, 132 Cal. 326, 64 Pac. 481; People v. Devine, 95 Cal. 227, 30 Pac. 378; People v. Burns, 63 Cal. 614; People v. Cochran, 61 Cal. 548 (per McKinstry, J.); People v. De Silvera, 59 Cal. 592; People v. March, 6 Cal. 543, 547.

5. People v. Devine, 95 Cal. 227, 30 Pac. 378; People v. Rowland, 12 Cal. App. 6, 24, 106 Pac. 428; People v. Roberts, 1 Cal. App. 447, 82 Pac. 624.

6. People v. Williams, 59 Cal. 674.

7. People v. Leary, 105 Cal. 486, 39 Pac. 24 (limiting People v. HERSHEY, 53 Cal. 574); People v. Cox, 76 Cal. 281, 18 Pac. 332 (where the words not reported consisted merely of words leading up to and in no way touched upon the oral charge which was properly taken down).

8. People v. Ybarra, 17 Cal. 166.

9. People v. Slater, 119 Cal. 620, 51 Pac. 957; People v. Messersmith, 61 Cal. 246.

10. People v. Lawler, 21 Cal. App. 63, 69, 131 Pac. 63.

ought not to have been given, whether erroneous as a matter of law or merely misleading, its action will be affirmed.¹¹

Commonplace matters.—It is not reversible error either to give¹² or to refuse to give¹³ an instruction which merely directs the attention of the jury to that which every intelligent man on the panel would doubtless keep in mind without being reminded of it by the court. Under this rule it is not prejudicial error either to instruct or to refuse to instruct a jury that a witness false in one part is to be distrusted in others,¹⁴ that evidence of oral admissions of the defendant should be received with caution,¹⁵ or that in weighing the testimony of a witness the jury should consider the circumstances under which he testifies.¹⁶

§ 607. Construction.—Instructions should be given a reasonable, not a close and technical, interpretation,¹⁷ and they should be construed in connection with the evidence¹⁸ and the remainder of the charge. Whether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court.¹⁹

11. *People v. Davis*, 64 Cal. 440, 1 Pac. 889.

12. *People v. Ryan*, 152 Cal. 364, 92 Pac. 853; *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. Herrera*, 32 Cal. App. 610, 163 Pac. 879. See *supra*, § 386.

13. *People v. Machuca*, 158 Cal. 62, 109 Pac. 886; *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

14. See *supra*, § 392.

15. See *supra*, § 359.

16. See *supra*, § 348.

17. *People v. Bruggy*, 93 Cal. 476, 485, 29 Pac. 26; *People v. Hamilton*, 62 Cal. 377, 384.

18. See *infra*, § 609.

19. *People v. Troutman*, 62 Cal. Dec. 505, 201 Pac. 928; *People v. Rulia Singh*, 182 Cal. 457, 188 Pac. 987; *People v. Wolff*, 182 Cal. 728, 739, 190 Pac. 22; *People v. Rulia Singh*, 182 Cal. 457, 478, 188 Pac. 987; *People v. Miller*, 177 Cal. 404, 170 Pac. 817; *People v. Hatch*, 163 Cal. 368, 125 Pac. 907; *People v. Akey*, 163 Cal. 54, 124 Pac. 718; *People v. Argentos*, 156 Cal. 720, 730, 106 Pac. 65; *People v. Besold*, 154 Cal. 363, 370, 97 Pac. 871; *People v. Griffith*, 146 Cal. 339, 345, 80 Pac. 68; *People v. Glover*, 141

If, when the instructions are considered as a whole, the charge correctly states the law so that the jury, as men of ordinary intelligence, can understand what is meant and apply it to the facts, no prejudice is suffered by defendant.²⁰

It is impossible to declare in each instruction the law governing every phase of the entire case. Nor is it to be expected that all the limitations of a principle will be given in every separate paragraph or sentence of a charge. If a charge, as a whole, correctly states the law, it is free from error notwithstanding selected passages may state a proposition without at the same time stating the excep-

Cal. 233, 242, 74 Pac. 745; *People v. Jackson*, 138 Cal. 462 70 Pac. 918; *People v. Mendenhall*, 135 Cal. 344, 67 Pac. 325; *People v. Westlake*, 124 Cal. 452, 57 Pac. 465; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *People v. Gibson*, 106 Cal. 458, 475, 39 Pac. 864; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Anderson*, 105 Cal. 32, 38 Pac. 513; *People v. Fehrenbach*, 102 Cal. 394, 402, 36 Pac. 678; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Ah Jake*, 91 Cal. 98, 27 Pac. 595; *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021; *People v. Alsemi*, 85 Cal. 434, 24 Pac. 810; *People v. Clark*, 84 Cal. 576, 24 Pac. 313; *People v. Flynn*, 73 Cal. 511, 15 Pac. 182; *People v. Kennedy*, 55 Cal. 202; *People v. Cleveland*, 49 Cal. 577; *People v. Welch*, 49 Cal. 174, 182; *People v. Bagnell*, 31 Cal. 409; *People v. Prather*, 2 Cal. Unrep. 447, 6 Pac. 315; *People v. Smith*, 2 Cal. Unrep. 204; *People v. Alba*, 35 Cal. App. Dec. 160, 199 Pac. 894; *People v. Sprague*, 35 Cal. App. Dec. 13, 198 Pac. 820; *People v. Argrusa*, 33 Cal. App. Dec. 329, 193 Pac. 819; *People v. Charlie*, 34 Cal. App. 411, 167 Pac. 703; *People v. Vaughan*, 34 Cal. App. 16, 166 Pac. 1031; *People v. Phillips*, 30 Cal. App. 31, 157 Pac. 1003, 1005; *People v. Woodson*, 29 Cal. App. 531, 156 Pac. 378; *People v. Wong Hing*, 28 Cal. App. 230, 151 Pac. 1159; *People v. Vukojevich*, 25 Cal. App. 459, 464, 143 Pac. 1058; *People v. Overacker*, 20 Cal. App. 67, 127 Pac. 1059; *People v. Russell*, 19 Cal. App. 759, 127 Pac. 829; *People v. Grow*, 16 Cal. App. 147, 116 Pac. 369; *People v. T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416; *People v. Stokes*, 11 Cal. App. 759, 106 Pac. 251; *People v. Cain*, 7 Cal. App. 163, 93 Pac. 1037; *People v. Quimby*, 6 Cal. App. 482, 488, 92 Pac. 493; *People v. Davis*, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

20. *People v. Akey*, 163 Cal. 54, 124 Pac. 718; *People v. Rodley*, 131 Cal. 240, 261, 63 Pac. 351; *People v. White*, 20 Cal. App. 156, 128 Pac. 417.

tions or qualifications to which it is subject in its application to the case in hand.¹

§ 608. Conflict in Instructions.—In a case where there is a conflict in the instructions and the court erred in the giving of one or more of them, and where it is impossible to determine whether the jury followed the law as correctly or as incorrectly set before them, a new trial will be ordered if by such error the defendant's substantial rights were affected.² Applying this rule it has been held that it is no answer to the objection that an erroneous instruction was given, for the prosecution to show that in another part of the charge another instruction was given in which the law was correctly stated.³ Thus a charge

1. *People v. Besold*, 154 Cal. 363, 370, 97 Pac. 871; *People v. Mendenhall*, 135 Cal. 344, 67 Pac. 325; *People v. Neber*, 125 Cal. 560, 58 Pac. 133; *People v. Burtle*, 123 Cal. 303, 55 Pac. 998; *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *People v. Kernaghan*, 72 Cal. 609, 615, 114 Pac. 566 (per Temple, J., dissenting); *People v. Demousset*, 71 Cal. 611, 12 Pac. 788; *People v. Tomlinson*, 66 Cal. 343, 5 Pac. 509; *People v. Hurtado*, 63 Cal. 288; *People v. Nelson*, 56 Cal. 77; *People v. Doyell*, 48 Cal. 85; *People v. Dennis*, 39 Cal. 625, 636; *People v. Thompson*, 1 Cal. Unrep. 416; *People v. Wong Hing*, 28 Cal. App. 230, 151 Pac. 1159; *People v. White*, 20 Cal. App. 156, 128 Pac. 417; *People v. Piercy*, 16 Cal. App. 13, 116 Pac. 322; *People v. T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416; *People v. Stevens*, 15 Cal. App. 294, 114 Pac. 800; *People v. Ruef*, 14 Cal. App. 576, 613, 114 Pac. 48, 54; *People v. Stokes*, 11 Cal. App. 759, 106 Pac.

251; *People v. Del Cerro*, 9 Cal. App. 764, 100 Pac. 887.

2. *People v. Harris*, 169 Cal. 53, 69, 145 Pac. 520; *People v. Maughs*, 149 Cal. 253, 261, 86 Pac. 187; *People v. Ford*, 138 Cal. 140, 70 Pac. 1075; *People v. Westlake*, 124 Cal. 452, 57 Pac. 465; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *People v. Marshall*, 112 Cal. 422, 44 Pac. 718; *People v. Thomson*, 92 Cal. 506, 512, 28 Pac. 589; *People v. Elliott*, 90 Cal. 586, 27 Pac. 433; *People v. Williams*, 73 Cal. 531, 15 Pac. 97; *People v. Bush*, 65 Cal. 128, 3 Pac. 590; *People v. Messersmith*, 57 Cal. 575; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *People v. Anderson*, 44 Cal. 65; *People v. Valencia*, 43 Cal. 552; *People v. Campbell*, 30 Cal. 312; *People v. Higgins*, 2 Cal. Unrep. 717, 12 Pac. 301; *People v. Neetens*, 42 Cal. App. 596, 184 Pac. 27; *People v. Bartnett*, 45 Cal. App. 89, 113 Pac. 879.

3. *People v. Westlake*, 124 Cal. 452, 57 Pac. 465; *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *People*

authorizing a conviction without proof of all the elements of the crime is not cured by the fact that a full and correct definition of the offense had previously been given.⁴

But the general rule above stated is subject to the exception that when the giving of conflicting or misleading instructions was not only invited by the defendant, but resulted solely to his advantage, he has no ground of complaint.⁵ A judgment will not be reversed because of a conflict in instructions which cannot operate injuriously to the appellant,⁶ as when the conflict was not substantial,⁷ or where it related to a question which was not in the case.⁸

§ 609. Cure of Error by Evidence or Verdict.—Instructions are given to juries to be applied to the facts as they may find them, and when their accuracy is challenged they should be construed with reference to the facts to which they are addressed, and not considered as abstract propositions of law to determine whether conditions may not exist when their giving would be erroneous. If an instruction, although incorrect when standing alone, is correct when considered in connection with the evidence to which it relates, the defendant cannot complain.⁹ Accordingly an instruction using the disjunctive “aiding or abet-

v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; People v. Valencia, 43 Cal. 552; People v. Neetens, 42 Cal. App. 596, 184 Pac. 27.

4. People v. Williams, 73 Cal. 531, 15 Pac. 97.

5. People v. Harris, 169 Cal. 53, 145 Pac. 520.

6. People v. Turcott, 65 Cal. 126, 3 Pac. 461, cited in People v. Hecker, 109 Cal. 451, 466, 30 L. R. A. 403, 42 Pac. 307; People v. Smith, 59 Cal. 601; People v. Velarde, 59 Cal. 457.

7. People v. Ah Luck, 62 Cal. 503.

8. People v. Smith, 59 Cal. 601.

9. People v. Lee Nam Chin, 166 Cal. 570, 137 Pac. 917; People v. Whalen, 154 Cal. 472, 98 Pac. 194; People v. Morine, 138 Cal. 626, 631, 72 Pac. 166; People v. Barney, 114 Cal. 554, 47 Pac. 41 (holding that a modification of a request that the jury disregard the testimony of a witness which had been stricken out, by adding the word “direct” before the word “testimony,” is not prejudicial where all the testimony of such witness is direct). People

ting" cannot be misunderstood and misapplied by the jury if there is no pretense of aid given innocently.¹⁰

Error cured by verdict.—Errors in the giving or refusal of instructions may be harmless in view of the verdict rendered. Inasmuch as it is a rule that a defendant found guilty of a lesser offense included in the offense charged is acquitted of the higher offenses,¹¹ it follows that he cannot be prejudiced by the giving¹² or the refusal to give instructions relating to the higher offenses.¹³ So also when the defendant is convicted of the greater offense, errors in instructions relating to the included offenses¹⁴

v. Lane, 101 Cal. 513, 518, 36 Pac. 16 (holding that an instruction that where insanity is shown to exist it is presumed to continue, "provided the exciting cause of such insanity also exists up to the time of the homicide," was harmless in view of evidence showing the defendant's mind was in a worse condition just prior to the homicide than ever before); People v. Bird, 60 Cal. 7; People v. Arnold, 15 Cal. 477, 482; People v. Petruzo, 13 Cal. App. 569, 578, 110 Pac. 324; People v. Fredoni, 12 Cal. App. 685, 108 Pac. 663; People v. Disperati, 11 Cal. App. 469, 479, 105 Pac. 617; People v. Davis, 1 Cal. App. 8.

10. People v. Morine, 138 Cal. 626, 631, 72 Pac. 166; People v. Fredoni, 12 Cal. App. 685, 108 Pac. 663.

11. See supra, § 101.

12. People v. Besold, 154 Cal. 363, 97 Pac. 871; People v. Gordon, 88 Cal. 422, 26 Pac. 502; People v. Boling, 83 Cal. 380, 23 Pac. 421; People v. Swift, 66 Cal. 348, 5 Pac. 505; People v. Taylor, 36 Cal. 255 (holding an erroneous definition of malice to be immaterial where a

verdict of guilty of manslaughter was rendered); People v. Hamilton, 32 Cal. App. Dec. 1059, 192 Pac. 469; People v. Sidwell, 29 Cal. App. 12, 19, 154 Pac. 290; People v. Clapp, 26 Cal. App. 523, 147 Pac. 469; People v. Barrett, 22 Cal. App. 780, 136 Pac. 520; People v. Russell, 19 Cal. App. 750, 127 Pac. 829; People v. Quimby, 6 Cal. App. 482, 92 Pac. 493; People v. Wright, 4 Cal. App. 706, 89 Pac. 364; People v. Ah Lung, 2 Cal. App. 278, 83 Pac. 296; People v. Green, 1 Cal. App. 432, 82 Pac. 544.

13. People v. Keefer, 65 Cal. 232, 3 Pac. 818; People v. Hope, 62 Cal. 291; People v. Nichol, 34 Cal. 211; People v. Hopper, 42 Cal. App. 499, 183 Pac. 836; People v. Vaughan, 34 Cal. App. 16, 166 Pac. 1031; People v. Chutuk, 18 Cal. App. 768, 124 Pac. 566; People v. Shimonaka, 16 Cal. App. 117, 116 Pac. 327; People v. Izlar, 8 Cal. App. 600, 97 Pac. 685.

14. People v. Stevens, 141 Cal. 488, 75 Pac. 62; People v. O'Neal, 67 Cal. 378, 7 Pac. 790; People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Wright, 45 Cal. 260; People v. Wise, 1 Cal. Unrep. 33.

or in an instruction whose only tendency can be to induce the jury to convict him of the lesser crime,¹⁵ may be immaterial.

XI. DETERMINATION AND DISPOSITION OF CAUSE.

§ 610. **In General.**—It is provided by the code as follows:

“The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to or dependent upon, such judgment or order, and may, if proper, order a new trial.”¹⁶

“When a new trial is ordered it must be directed to be had in the court of the county from which the appeal was taken.”¹⁷

When the interests of justice can in no manner be subserved by a reversal, the court will affirm the judgment. Thus where the trial court erroneously “directs” the rendition of a verdict of acquittal on the evidence, a reversal will be of no advantage to the prosecution because the defendant, having been once in jeopardy, cannot be retried if he interposes the plea of once in jeopardy. Under such circumstances the judgment will be affirmed.¹⁸ If the information fails to charge an offense, the cause will be reversed with directions to dismiss the information.¹⁹ But when the only error is the entry of a judgment not in conformity with the verdict, the cause will be reversed with directions to render and enter judgment as required by

15. *People v. Clary*, 72 Cal. 59, 13 Pac. 77.

16. Pen. Code, § 1260. See *supra*, § 546, as to affirmance for want of brief; and § 590 et seq., as to harmless and reversible error.

17. Pen. Code, § 1261.

18. *People v. Stoll*, 143 Cal. 689, 77 Pac. 818 (but see dissent of Beatty, C. J., in which he says a dismissal rather than an affirmance is the proper practice); *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016.

19. *People v. Schweichler*, 16 Cal. App. 738, 117 Pac. 939.

law.²⁰ Under section 1260 of the Penal Code an appellate court may modify the judgment appealed from.¹ And so, if a portion of the judgment is void and that portion can be segregated from the remainder, the appellate court may strike out the void portion,² and affirm the judgment as modified,³ or it may remand the cause with direction to pronounce the proper judgment.⁴ If the direction for imprisonment for nonpayment of fine exceeds the maximum time by which the offense is punishable, the judgment is erroneous merely and may be modified by the appellate court.⁵ A defendant is not entitled to be discharged upon the rendition of a faulty verdict but is entitled to a new trial.⁶ In such case the appellate court may order a new trial, even though the defendant does not move therefor, and disputes the power of the court to grant it.⁷

§ 611. Discharge of Defendant on Reversal.—Section 1262 of the Penal Code provides:

20. *People v. Johnson*, 71 Cal. 384, 12 Pac. 261.

1. *Hogan v. Superior Court*, 16 Cal. App. 783, 117 Pac. 947.

2. *People v. Fick*, 89 Cal. 144, 26 Pac. 759; *People v. Kerr*, 15 Cal. App. 273, 114 Pac. 584.

3. *People v. Wademan*, 38 Cal. App. 116, 137, 175 Pac. 791; *People v. Rossi*, 37 Cal. App. 778, 174 Pac. 916.

4. *People v. Gonzales*, 36 Cal. App. 782, 173 Pac. 407.

If a trial court omits to fix a term of imprisonment where the indeterminate sentence law does not apply, the case will be remanded with instructions to pronounce judgment under the law as it stood at the time the crime was committed. *People v. Votaw*, 38 Cal. App. 714, 177 Pac. 485.

5. *People v. Goscinsky*, 34 Cal. App. Dec. 869, 198 Pac. 40.

When a judgment is void merely as to that portion directing imprisonment until payment of a fine, the appellate court may modify it by striking therefrom the void portion. *People v. Hamberg*, 84 Cal. 468, 475, 24 Pac. 298.

6. *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776; *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *People v. Gilbert*, 57 Cal. 96; *People v. Baza*, 53 Cal. 690; *People v. Bannister*, 4 Cal. Unrep. 333, 34 Pac. 710. See *supra*, § 95.

7. *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776; *People v. Travers*, 77 Cal. 176, 19 Pac. 268; *People v. Barric*, 49 Cal. 342; *People v. Olwell*, 28 Cal. 456.

“If a judgment against the defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant.”⁸

When there is an appeal from a judgment, and also from an order denying a new trial, a judgment reversing the order is in effect the ordering of a new trial and is a compliance with the code provision.⁹ It is observed that section 1262 of the Penal Code does not provide that a reversal of a judgment without an order for a new trial has ipso facto the legal effect of discharging a defendant so that he may demand his release by the trial court or some other court upon habeas corpus or other proceeding. The appellate court only, in reversing a judgment, is given jurisdiction to discharge the defendant, and if, upon reversing the judgment, it fails to order a new trial, the remedy of the appellant is in the appellate court by a motion for an order directing his discharge. On such motion the appellate court will either make an order directing the discharge of the defendant, if such an order should in its judgment be made, or it will make an order affirming or reversing the order denying a new trial. If the ground of reversal requires a new trial, and the failure to dispose of the appeal from the order denying a new trial was an inadvertence, the court will make an order reversing such order.¹⁰

8. *People v. Elphis*, 7 Cal. Unrep. 150, 72 Pac. 838 (where the indictment is fatally defective, the appellate court, under this section, has no discretion to do otherwise than discharge the defendant).

9. *Ex parte Ballard*, 149 Cal. 114, 84 Pac. 833 (holding that the defendant is not entitled to be dis-

charged without a showing as to the disposition of the appeal from the order denying a new trial); *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028.

10. *Ex parte Ballard*, 149 Cal. 114, 84 Pac. 833; *People v. Ballard*, 13 Cal. App. 511, 110 Pac. 351.

§ 612. Modification or Vacation of Judgment on Appeal.

A district court of appeal before its judgments become final, or before the causes in which such judgments are rendered are transferred to the supreme court upon petition, has the right to modify its judgments or set them aside, if for good reasons such a course is required.¹¹ Accordingly, an affirmance for want of brief may be vacated and the appeal reinstated upon a proper showing, as, for example, that the time for filing briefs was extended by a stipulation not on file,¹² or upon a showing that counsel was prevented by illness from preparing a brief or appearing in court on the day set for hearing.¹³ But to authorize the court in granting the motion it must appear that there is some error in the record or some possible claim of error.¹⁴

§ 613. Remand of Cause and Proceedings Thereafter.—

The Penal Code provides as follows:

“When the judgment of the appellate court is given, it must be entered in the minutes, and a certified copy of the entry, with a copy of the opinion of the court attached thereto, forthwith remitted to the clerk of the court from which the appeal was taken.”¹⁵

“After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted.”¹⁶

11. *People v. Perea*, 36 Cal. App. 292, 171 Pac. 1091 (per opinion on denying a rehearing).

12. *People v. Mora*, 50 Cal. 468.

13. *People v. Busby*, 113 Cal. 181, 45 Pac. 191.

14. *People v. Busby* 113 Cal. 181, 45 Pac. 191; *People v. Moran*, 3

Cal. Unrep. 740, 31 Pac. 853 (denying a motion made on the ground of the clerk's failure to make a record of the filing of the brief, where an examination of the brief fails to disclose anything justifying a reversal).

15. Pen. Code, § 1264.

16. Pen. Code, § 1265.

The Criminal Practice Act contained substantially the same provisions.¹⁷ From the time a certified copy of the entry of the judgment of the appellate court is remitted to the clerk of the trial court, the appellate court has no further jurisdiction of the cause appealed, and upon the receipt and filing of the remittitur by the clerk of the trial court, that court is immediately revested with full and exclusive jurisdiction of the case; that is, the trial court resumes its jurisdiction as fully and absolutely as though no appeal or suspension of its jurisdiction had ever occurred.¹⁸ The decision upon appeal is the law of the case governing the rights of the parties and the conduct of the trial judge in the further proceedings. And when the case is remanded with directions as to the procedure to be pursued, the trial court has no discretion but to obey the mandate of the appellate court.¹⁹

The effect of a reversal of a judgment and an order denying a motion for a new trial is to leave the case in the same position as if no trial had been had.²⁰ The defendant is remitted to his original position upon his plea of not guilty, and upon going down of the remittitur the superior court has jurisdiction to proceed in the case in any way authorized by the criminal law.¹ Where a defendant was on the former trial convicted of an offense included in that charged, he may be tried for the lesser offense upon the same or a different indictment or information. All the testimony must be produced anew, and the former verdict can be pleaded in bar of a conviction of the greater offense. It is perhaps unnecessary to instruct the jury as to the greater offense, but when the offense for which the accused is tried is necessarily included therein, an instruction defining the greater crime and telling the

17. Crim. Prac. Act, §§ 504, 506.

18. *People v. Dick*, 39 Cal. 102.

19. *People v. Bennett*, 5 Cal. Unrep. 824, 50 Pac. 703.

20. *People v. Mooney*, 132 Cal. 13,

63 Pac. 1070; *People v. Hardisson*,

61 Cal. 378.

1. *People v. Mooney*, 132 Cal. 13,

63 Pac. 1070; *People v. Schmidt*,

64 Cal. 260, 30 Pac. 814.

jury that they may convict of the lesser if the evidence warrants a conviction of the greater is not prejudicial.²

Upon reversal of an order granting a new trial, the only duty to be performed by the trial court is to render judgment upon the verdict. The court has no jurisdiction to entertain any other plea than that passed upon by the jury.³ Upon reversal of an order denying a motion in arrest of judgment without any specific directions, the court should dismiss the indictment or information and make all other proper orders called for in that connection.⁴

If a judgment against the defendant is affirmed, the original judgment must be enforced.⁵ And no order of the appellate court directing the trial court to proceed to enforce the judgment is necessary to revest that court with jurisdiction.⁶

Proceedings in appellate court after remand.—When a remittitur has been regularly issued and filed, and there has been no violation of law or the rules of the appellate court, and no mistake of facts and no fraud or imposition practiced by the prevailing party upon the court or upon the losing party, the jurisdiction of the appellate court over the case is at an end. The judgment is final and the court is without power to recall its remittitur.⁷

U. SUCCESSIVE CRIMES AND HABITUAL OFFENDERS.

§ 614. *In General.*—The Penal Code and statutes contain provisions prescribing increased penalties for subse-

2. *People v. McFarlane*, 138 Cal. 481, 61 L. R. A. 245, 71 Pac. 568, 72 Pac. 48.

3. *People v. Woods*, 84 Cal. 441, 23 Pac. 1119.

4. *People v. Coronado*, 144 Cal. 207, 79 Pac. 418.

5. Pen. Code, § 1263.

6. *People v. Dick*, 39 Cal. 102.

7. *People v. McDermott*, 97 Cal. 247, 32 Pac. 7; *People v. Sprague*, 57 Cal. 147. See *APPEAL AND ERROR*, vol. 2, p. 1067.

quent offenses.⁸ The increased punishment is for the last offense committed. The prisoner is not again punished for the first offense, but the punishment for the second is increased, because experience has shown that a severer punishment is demanded to protect society against persistent and hardened offenders.⁹ Such statutes, therefore, do not violate the constitutional provision that no person shall be twice put in jeopardy for the same offense;¹⁰ nor do they inflict cruel and unusual punishment.¹¹ Neither are they objectionable as being *ex post facto*, merely because the prior conviction was had before they took effect.¹² These statutes have not been repealed by the indeterminate sentence law. The fact of prior conviction, when established, must be considered by the state board of prison directors in fixing the duration of the imprisonment under an indeterminate sentence.¹³

8. Pen. Code, §§ 648, 654, 666, 667, 668; *People v. Boren*, 139 Cal. 210, 72 Pac. 899 (citing Pen. Code, § 666, subd. 2); *People v. Burns*, 138 Cal. 159, 60 L. R. A. 270, 69 Pac. 16, 70 Pac. 1087 (decided under Pen. Code, § 666, subd. 1, as it stood prior to 1903); *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 76; *People v. Brooks*, 65 Cal. 300, 4 Pac. 11 (under Pen. Code, § 666, subd. 2); *People v. O'Neil*, 61 Cal. 435 (holding under what is now subdivision 1 of Pen. Code, § 667, that when the statute defining the offense does not fix the maximum term of imprisonment, the punishment of a second offense is life imprisonment); *People v. Delany*, 49 Cal. 394 (under subdivision 2 of Pen. Code, § 667, a conviction of petit larceny, after other convictions for petit larceny subjects the

defendant to imprisonment in the state prison); *People v. Dueber*, 34 Cal. App. 686, 168 Pac. 578 (decided under Stats. 1915, p. 863, forbidding the sale of poisons); *Matter of Application of Lang*, 30 Cal. App. 442, 158 Pac. 1056 (decided under Stats. 1911, p. 599).

9. *People v. Coleman*, 145 Cal. 609, 79 Pac. 283; *People v. King*, 64 Cal. 338, 30 Pac. 1028.

10. *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401 (cited in *Moore v. Missouri*, 159 U. S. 673, 40 L. Ed. 301, 16 Sup. Ct. Rep. 179, see, also, *Rose's U. S. Notes*).

11. *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401.

12. See *supra*, § 8.

13. *People v. Howard*, 39 Cal. App. 216, 178 Pac. 865.

§ 615. Arraignment—Withdrawal of Admission or Denial of Prior Conviction.—Section 1025 of the Penal Code provides in part as follows:

“When a defendant who is charged in the indictment or information with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted or informed against, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction.”¹⁴

This section was inserted in the code in 1874, repealed in 1880, and re-enacted in 1905.¹⁵ It has reference exclu-

14. *People v. Kelly*, 120 Cal. 271, 52 Pac. 587, holding that where a defendant is charged with several former convictions, an entry that the defendant “admits prior conviction” must be taken as an admission of all prior convictions charged. *People v. Coleman*, 145 Cal. 609, 79 Pac. 283, holding that the defendant may plead not guilty of the principal offense charged and confess the previous convictions. And see *People v. Kirk*, 32 Cal. App. 517, 163 Pac. 696, where the court erroneously excluded evidence of a prior conviction, to which the defendant refused to plead on his arraignment.

15. See the following cases as to the proceedings upon arraignment

under the law existing between 1880 and 1905; *People v. McNeill*, 118 Cal. 388, 50 Pac. 588; *People v. McGregar*, 88 Cal. 140, 26 Pac. 97 (holding that upon arraignment, the defendant may be asked if he has suffered a previous conviction); *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95 (stating that *People v. King*, 64 Cal. 338, 30 Pac. 1028, has been in effect overruled); *People v. Gutierrez*, 74 Cal. 81, 15 Pac. 444; *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 76; *People v. Neason*, 67 Cal. 225, 7 Pac. 644; *People v. Brooks*, 65 Cal. 295, 4 Pac. 7; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. King*, 4 Cal. App. 213, 87 Pac. 400; *People v. Noon*, 1 Cal. App. 44, 81 Pac. 746 (hold-

sively to those cases where a previous conviction of some other and distinct offense is alleged for the purpose of enabling the court to impose a greater punishment than is authorized for the offense charged in the absence of such conviction.¹⁶

Withdrawal of denial or admission.—There is no question that when one is charged with a previous conviction and has pleaded simply not guilty, he may be permitted afterwards, in the discretion of the court, to withdraw his plea as to that charge and enter a plea of guilty thereof.¹⁷ So also a defendant, who has admitted the previous conviction, may be allowed to withdraw his admission. Unless he has done so, he will not be permitted to question the fact admitted.¹⁸

§ 616. Proceedings Where Prior Conviction is Put in Issue.—In the prosecution of habitual offenders the former conviction, being a material fact in the case, must necessarily be pleaded,¹⁹ and if put in issue must be proved as any other material fact in the case.²⁰ The fact that the defendant had been previously convicted is a distinct ele-

ing that an admission of the former conviction should be entered in the minutes). See *People v. Delany*, 49 Cal. 394, holding, under the code prior to the adoption of section 1025, that a plea of "not guilty" puts in issue the charge of a prior conviction and a plea of "guilty" is an admission of the charge.

16. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74 (holding that the code section has no reference to a case where the fact of a prior conviction is an essential element of the crime charged as under Pen. Code, § 246).

17. *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116; *People v. Wheat-*

ley, 88 Cal. 114, 26 Pac. 95; *People v. Lewis*, 64 Cal. 401, 1 Pac. 490.

18. *People v. Appleton*, 120 Cal. 250, 52 Pac. 582.

19. *People v. Coleman*, 145 Cal. 609, 79 Pac. 283; *Matter of Application of Long*, 30 Cal. App. 442, 158 Pac. 1056 (holding, however, that the failure to allege a prior conviction does not go to the jurisdiction of the court so as to entitle a defendant to discharge on habeas corpus). See **INDICTMENT AND INFORMATION**.

20. *People v. Coleman*, 145 Cal. 609, 79 Pac. 283. See *supra*, § 478, to the point that Pen. Code, § 1204, does not prescribe the quantum of proof necessary.

ment of the charge against him.¹ Since, as has been stated, the extrajudicial admissions of a defendant are insufficient to establish his guilt or any essential element of the crime charged,² it follows that the fact of a former conviction cannot be proved merely by an extrajudicial admission of the defendant.³ The fact is sufficiently proved, however, by a certified copy of the record of the superior court showing the fact of conviction and sentence, and by evidence of an admission to that effect made by the defendant.⁴

In determining the guilt of a defendant of the crime charged against him the jury should disregard the evidence introduced to establish his conviction of the previous felony.⁵

“Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: ‘We find the charge of previous conviction true,’ or, ‘We find the charge of previous conviction not true,’ as they find that the defendant has or has not suffered such conviction.”⁶

This code provision is not limited exclusively to sections 666 and 667 of the Penal Code, but applies to any case in which a previous conviction of a crime may be proved for the purpose of authorizing a more drastic punishment than

1. *People v. Delaney*, 49 Cal. 394 (cited in *People v. Dueber*, 34 Cal. App. 686, 168 Pac. 578); *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

2. See *supra*, § 248.

3. *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389 (an admission made on a former trial in another case is extrajudicial as to

the trial of the present case and is insufficient to establish a prior conviction).

4. *People v. Hettick*, 126 Cal. 425, 58 Pac. 918 (citing *People v. Rolfe*, 61 Cal. 540).

5. *People v. Von*, 78 Cal. 1, 20 Pac. 35.

6. Pen. Code, § 1158.

could otherwise be inflicted.⁷ Under this provision it is the duty of the jury to make a specific finding on the issue of a prior conviction. An omission to do this is fatal to the judgment unless the subsequent crime charged is itself one for the commission of which it is within the jurisdiction to impose punishment.⁸ If the crime is within the jurisdiction of the superior court, a general verdict of guilty is to be taken as against the defendant on the crime charged, and in favor of the defendant on the issue of prior conviction, and judgment should be rendered accordingly.⁹ The verdict as to a former conviction is severable from the remainder and if it is for any reason illegal, it may be disregarded and judgment entered upon that portion of the verdict which is valid. But if the judgment actually pronounced is such that it may have been imposed for a former conviction, it cannot be assumed upon appeal that the trial court disregarded that portion of the verdict, even though the same sentence could have been imposed if the jury had found against the former conviction.¹⁰

§ 617. Proceedings Where Prior Conviction is Admitted.

It is provided by the code that

“In case the defendant pleads not guilty, and answers that he has suffered a previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial.”¹¹

A previous conviction is charged, not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining the punishment to be imposed in case

7. *People v. Dueber*, 34 Cal. App. 686, 168 Pac. 578.

8. *People v. Franklin*, 36 Cal. App. 23, 171 Pac. 441; *People v. Dueber*, 34 Cal. App. 686, 168 Pac. 578.

9. *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037.

10. *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

11. Pen. Code, § 1025 (in part).

of conviction.¹² When, then, the prior conviction is admitted, the clerk in reading the indictment to the jury shall omit therefrom all that relates to such previous conviction.¹³ No testimony in regard thereto can be offered,¹⁴ and the district attorney in his argument must not refer thereto.¹⁵ Any error in violating this rule is not rendered harmless by an attempt of the defendant to avoid its effects by proving that he had been pardoned for the offense, the prior conviction of which had been charged in the indictment, nor is it cured by an instruction to the jury that they had nothing to do with the prior conviction but only to determine whether the offense charged was committed by the defendant.¹⁶ This rule does not, however, affect the right of the prosecution to impeach the defendant, when he becomes a witness, by showing that he has been convicted of a felony.¹⁷ Nor does it forbid the cross-examination of a witness to the good character of the defendant as to his knowledge of such prior conviction.¹⁸ In the latter case the district attorney in his argument may refer to the prior offense for the pur-

12. *People v. Thomas*, 110 Cal. 41, 42 Pac. 456.

13. Pen. Code, § 1093, subd. 1, § 1025; *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95; *People v. Sansome*, 84 Cal. 449, 24 Pac. 143; *People v. Meyer*, 73 Cal. 548, 15 Pac. 95. See *People v. Douglass*, 87 Cal. 281, 25 Pac. 417, holding that a statement in the minutes, "the information is read and the plea of not guilty stated to the jury by the clerk" is not to be construed as a statement that the whole information, including the charge of prior conviction, was read.

14. *People v. Thomas*, 110 Cal. 41,

42 Pac. 456; *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95.

15. *People v. Smith*, 143 Cal. 597, 77 Pac. 449.

16. *People v. Sansome*, 84 Cal. 449, 24 Pac. 143.

17. *People v. Arnold*, 116 Cal. 682, 48 Pac. 803; *People v. Oubridge*, 38 Cal. App. 68, 175 Pac. 276; *People v. Martini*, 21 Cal. App. 743, 132 Pac. 1069; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009; *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172. See WITNESSES.

18. *People v. Stennett*, 34 Cal. App. Dec. 501, 783, 197 Pac. 372, 377. See WITNESSES.

pose of showing that the defendant failed to establish a good general reputation.¹⁹

If a defendant admits the charge of former conviction, the jury need not find specifically thereon.²⁰ It is not error to charge the jury that if they find the defendant guilty, they should find him guilty as charged, for such an instruction cannot be understood as referring to the prior conviction.¹

Judgment.—When a charge of a prior conviction is admitted by a defendant, and the jury return a verdict of guilty of the crime charged or any included offense, the court can pronounce judgment upon the verdict and the admission.² When judgment of conviction is rendered, the Penal Code directs the clerk in his entry of judgment to state the fact of a prior conviction.³ A failure of the clerk to observe this provision does not render the judg-

19. *People v. Stennett*, 34 Cal. App. Dec. 783, 197 Pac. 372.

20. *People v. Chadwick*, 143 Cal. 116, 121, 76 Pac. 884; *People v. McNeill*, 118 Cal. 388, 50 Pac. 538; *People v. Meyer*, 73 Cal. 548, 15 Pac. 95 (holding an instruction to the contrary to be error); *People v. Brooks*, 65 Cal. 295, 4 Pac. 7; *People v. Carlton*, 57 Cal. 559.

1. *People v. Ross*, 77 Cal. 416, 19 Pac. 691.

2. *Ex parte Williams*, 89 Cal. 421, 26 Pac. 887; *People v. Barton*, 88 Cal. 176, 25 Pac. 1117; *People v. Johnson*, 88 Cal. 171, 25 Pac. 1116; *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. 76; *People v. Brooks*, 65 Cal. 295, 4 Pac. 7.

3. Pen. Code, § 1207; *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95 (holding that the statute is sufficiently complied with where the judgment recites that when the defendant was called up to be sen-

tenced, he was duly informed by the court of the information charging him "with the crime of burglary and prior conviction of burglary in the first degree; of his arraignment and plea of guilty as charged in said information, and guilty of said prior conviction"); *People v. Douglass*, 87 Cal. 281, 25 Pac. 417 (holding that there is a sufficient compliance with the statute where the judgment recites that the defendant, having answered and confessed to a previous conviction of manslaughter, and having been convicted in this court of the crime of assault, it is therefore ordered, etc.). See *People v. McNeill*, 118 Cal. 388, 50 Pac. 538, holding that a recital in the judgment that the defendant confessed the prior conviction must be accepted as a verity when not contradicted by the record and when there is no attempt to prove it untrue.

ment void, the fact of prior conviction being elsewhere competently stated in the record.⁴ It merely renders the judgment erroneous, but the error does not affect any substantial right of the defendant and is not ground for a reversal.⁵

V. PUNISHMENT.

§ 618. **Legislative Powers and Exercise Thereof.**—The power over the subject of punishment for crime is vested in the legislature,⁶ subject only to the constitutional guaranty of the equal protection of the laws,⁷ and the inhibition against the infliction of cruel and unusual punishments,⁸ and against the infliction of punishment *ex post facto*.⁹ The legislature has undoubted authority to fix the penalty to suit the crime, or, in other words, to fix different penalties for different crimes, the penalty in each case being measured or fixed according to the nature of the particular crime and its effect upon society.¹⁰ In cases of offenses which are *malum prohibitum*, the penalty must rest largely in the sound discretion of the legislative branch of the government and be such as is deemed necessary to prevent the prohibited act. If the nature of the offense warrants it, a penalty of imprisonment without the alternative of punishment for first offenders may be prescribed, although the offense is not *malum in se*.¹¹

4. *People v. Kelly*, 120 Cal. 271, 52 Pac. 587; *Ex parte Williams*, 89 Cal. 421, 26 Pac. 887. See *supra*, § 490.

5. *People v. Kelly*, 120 Cal. 271, 52 Pac. 587.

6. *People v. Conness*, 150 Cal. 114, 88 Pac. 821; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; *State v. McCauley*, 15 Cal. 430, 455; *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 776. See *supra*, § 78.

7. See *supra*, § 9.

8. See *infra*, § 619.

9. See *supra*, § 8.

10. *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845. See *Collins v. Johnston*, 237 U. S. 502, 510, 59 L. Ed. 1071, 35 Sup. Ct. Rep. 649, see, also, *Rose's U. S. Notes*, holding the comparative gravity of criminal offenses, and whether their consequences are more or less serious, are matters for the state itself to determine and cannot be passed upon by the federal courts.

11. *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724.

A law is not invalid simply because it permits criminals to be subjected to different degrees of punishment for the same offense in different courts. Therefore, section 1205 of the Penal Code is not invalid because a person charged with a felony and convicted of a misdemeanor might be sentenced by the superior court to a greater term of imprisonment than he would have received if he had been tried before a justice of the peace.¹²

Double punishment.—There is no restriction upon the power of the legislature to prescribe double, treble or any number of punishments for an offense, except that they must not be cruel and unusual, and must not be applied *ex post facto*.¹³ The legislature in prescribing the penalty for a felony may provide a fine in addition to imprisonment in the state prison.¹⁴ Accordingly, section 672 of the Penal Code provides as follows:

“Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed.”

This is a general section and authorizes the court in its discretion to add a fine to the sentence of imprisonment.¹⁵

§ 619. Cruel or Unusual Punishments.—The constitution forbids the infliction of “cruel or unusual punishments.”¹⁶ This constitutional provision is applica-

12. *In re Mulholland*, 97 Cal. 527, 32 Pac. 568.

13. *People v. Durrant*, 119 Cal. 201, 51 Pac. 185 (holding that while imprisonment in the penitentiary pending execution of a sentence of death is a distinct part of the punishment, the order or judgment is not void on that account). See *People v. Perini*, 94 Cal. 573, 29 Pac. 1027, holding that a statute

providing for punishment in the state prison or in the county jail, or by both, is not subject to the objection that it authorizes double punishment.

14. *People v. Boren*, 139 Cal. 210, 72 Pac. 899.

15. *People v. Phillips*, 30 Cal. App. 31, 157 Pac. 1003, 1005.

16. Const., art. I, § 6; *People v. Conness*, 150 Cal. 114, 88 Pac. 821

ble alike to both the legislative and judicial departments.¹⁷

A penalty cannot be declared cruel unless it shocks the moral sense and outrages those innate principles of humanity which have been broadened and established by enlightened states.¹⁸ The courts may denounce a punishment as unusual only when the punishment is out of all proportion to the offense, and is beyond question an extraordinary penalty for a crime of ordinary gravity committed under ordinary circumstances.¹⁹ The term "cruel and unusual punishments," when it first found place in the Bill of Rights, meant not a fine or imprisonment or both, but such punishment as that inflicted by the whipping-post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit, cutting off

(holding Stats. 1891, p. 285, valid); *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372 (holding a maximum sentence for conspiracy to obtain money by false pretenses is not cruel or excessive, though no greater sentence can be imposed for conspiracy to commit murder); *Ex parte Mitchell*, 70 Cal. 1, 11 Pac. 488 (holding punishment prescribed by Pen. Code, § 245, is not cruel or unusual); *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845 (holding Pen. Code, § 288, valid).

The corresponding provision in the United States constitution is a limitation upon the federal government, not upon the states. *Collins v. Johnston*, 237 U. S. 502. See CONSTITUTIONAL LAW, vol. 5, p. 721.

Section 681 of the Penal Code provides as follows: "It shall be unlawful to use in the prisons or reformatory institutions of this state any cruel or unusual punishments; and punishment by the use of the strait-jacket, gag, thumb-screw,

shower-bath, or the tricing up of prisoners is hereby prohibited."

17. *In re Hallawell*, 8 Cal. App. 563, 97 Pac. 320.

18. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *In re Finley*, 1 Cal. App. 198, 81 Pac. 1041.

The term "cruel and unusual punishments" means those of a barbarous character and unknown to the common law. *State v. McCauley*, 15 Cal. 430, 455; *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 776.

19. *In re Finley*, 1 Cal. App. 198, 81 Pac. 1041. See *People v. Beatty*, 14 Cal. 566, holding the fact that punishment is disproportionate to the offense is a matter for the legislature not the courts. And see *People v. Anderson*, 30 Cal. App. 542, 159 Pac. 211, holding that a sentence to pay a fine of five hundred dollars, or imprisonment at the rate of one day for each two dollars, for a violation of the fishing laws is not excessive.

his nose, ears or limbs, or strangling him to death. It was such severe, cruel and unusual punishments as disgraced the civilization of former ages and made one shudder with horror to read of them.²⁰ Imprisonment in the county jail or state prison is neither cruel nor unusual in the sense used in the constitution.¹ And it has been held that there is nothing cruel or unusual in close confinement in the penitentiary.² The infliction of the death penalty by any of the methods ordinarily adopted by civilized people, such as hanging, shooting or electricity, is not cruel per se, for the whole current of law for penalties justifies its infliction.³ And the death penalty is not disproportionate to the offense of assault with a deadly weapon committed by a person undergoing a life sentence.⁴

§ 620. Place of Imprisonment.—It is the fact of imprisonment, the labor during confinement and the civil consequences attaching to the conviction that constitute the punishment, not the place of the imprisonment. Accordingly, the legislature may provide that all judgments of conviction for felonies or misdemeanors shall be executed in one place, or that those in different parts of the state may be executed in different places, or having prescribed different places for such purposes, it may leave it to the discretion of the court in each instance to determine in which of them the judgment shall be executed.⁵ It is competent, also, for the legislature to provide that persons

20. *People v. Antonio*, 27 Cal. 404; *In re O'Shea*, 11 Cal. App. 568, 575, 105 Pac. 776 (per Cooper, P. J.).

1. *In re O'Shea*, 11 Cal. App. 568, 575, 105 Pac. 776.

2. *People v. Durrant*, 119 Cal. 201, 51 Pac. 185.

3. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *In re Finley*, 1 Cal. App. 198, 202, 81 Pac. 1041.

4. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *People v. Quijada*, 154 Cal. 243, 97 Pac. 689; *In re Finley*, 1 Cal. App. 198, 81 Pac. 1041; *S. C.*, *People v. Finley*, 153 Cal. 59, 94 Pac. 248.

5. *In re Ambrosewif*, 109 Cal. 264, 41 Pac. 1101; *Ex parte Williams*, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248.

convicted of felony in a designated county be sentenced to imprisonment in a house of correction, although a perpetrator of the same crime in any other part of the state would be sent to the state prison.⁶ So also the legislature may provide that when imprisonment is ordered by a police court it shall be by confinement in a city jail, although the same offense committed outside the city limits would be punishable by imprisonment in the county jail.⁷

§ 621. Extent and Duration of Punishment.—The code provides as follows:

“Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison, not exceeding five years.”⁸

“Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both.”⁹

Referring to these sections, the supreme court in a late case has said: “They manifestly refer only to offenses declared by the code of which they are a part, and are designed solely to provide a penalty for any offense where no other penalty was specially provided for. . . . It certainly would not be reasonable to read them as showing an intention to prescribe the maximum penalty for offenses that might be declared by the legislature by statutes not a part of any code, or by provisions of the other codes of the state, for which the legislature might desire

6. *Ex parte Williams*, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248; *Ex parte Moon Fook*, 72 Cal. 10, 12 Pac. 803 (decided under Stats. 1877-78, p. 953, since repealed, Stats. 1893, p. 5); *Ex parte Flood*, 64 Cal. 251, 30 Pac. 437.

7. *In re Ambrosewf*, 109 Cal. 264, 41 Pac. 1101.

8. Pen. Code, § 18.

9. Pen. Code, § 19; *Matter of Application of Robbins*, 27 Cal. App. 677, 151 Pac. 14; *Arfstein v. Superior Court*, 20 Cal. App. 269, 128 Pac. 949.

to provide a more severe penalty." Hence, it has been held that the code provisions quoted above do not limit the power of counties, cities and towns in the matter of prescribing penalties for the violation of regulations enacted by them.¹⁰

Punishment for attempt.—The Penal Code provides that the punishment for an attempt to commit a crime punishable by imprisonment in the state prison for five years or more shall be for a term not exceeding one-half of the longest term of imprisonment prescribed upon a conviction of that offense.¹¹ It has been contended that when the longest term of imprisonment for an offense is life, an attempt to commit it must be punished if at all, for one-half of life, and that as such punishment is impossible of calculation, no judgment whatever could be rendered. This argument has been declared to be unsound. It is the rule in such a case that a defendant can be legally sentenced for a definite term of years.¹² In computing the judgment, the court cannot take as a basis, the expectation of life upon which insurance companies calculate their policies.¹³ It may, however, compute the term of imprisonment upon the basis of a judgment for a term of years which might have been rendered in case the attempted offense had been committed. Since a judgment of imprisonment for life is greater than one for a term of years, a judgment so calculated will be valid, as the greater includes the less.¹⁴

10. In re Isch, 174 Cal. 180, 162 Pac. 1026 (per Angellotti, C. J.). 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087; People v. Gardner, 98 Cal.

11. Pen. Code, § 664; Ex parte Hope, 59 Cal. 423 (punishment for attempt to commit burglary in the first degree). 127, 32 Pac. 880.

12. People v. Stouter, 142 Cal. 146, 75 Pac. 780; People v. Burns, 13. People v. Burns, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087.

14. People v. Gardner, 98 Cal. 127, 32 Pac. 880.

§ 622. When Statute Does not Fix Maximum or Minimum Punishment.—There is no constitutional objection to statutes which fix only a minimum or a maximum punishment for a public offense.¹⁵ A statute fixing a minimum punishment only is in the case of felonies aided by the provisions of section 671 of the Penal Code, wherein it is prescribed:

“Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed.”¹⁶

Neither section 18 nor 19 of the Penal Code is applicable in such case, because by their very terms they are applicable only to cases where some other punishment is not prescribed by the code and are not joined and invoked with some other section of the code which provides a penalty.¹⁷

A statute fixing only a maximum punishment for a felony is aided by section 18a of the Penal Code, adopted in 1919, which provides as follows:

“Except in cases where a different minimum punishment is prescribed by law, for every offense declared to be a felony and punishable by imprisonment in the state prison, the minimum punishment shall be imprisonment in the state prison for not less than six months.”

15. *People v. Nop*, 124 Cal. 150, 56 Pac. 786; *In re Hallawell*, 8 Cal. App. 563, 97 Pac. 320, holding that, in determining the validity of a statute which does not fix the maximum punishment, it cannot be assumed that the courts will inflict penalties wholly disproportionate to the offense charged.

16. *People v. Brooks*, 131 Cal. 311, 63 Pac. 464; *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Brooks*, 65 Cal. 296, 4 Pac. 7; *People v. O'Neil*, 61 Cal. 435; *People v. Camp*, 42 Cal. App. 411, 183 Pac. 845. See *supra*, § 486.

17. *People v. Nop*, 124 Cal. 150, 56 Pac. 786.

§ 623. Computation of Term of Imprisonment.—It is a general rule under the Penal Code, with some exceptions, that

“The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment.”¹⁸

When a defendant is resented after the imposition of a void sentence, the second sentence speaks from the date of its rendition and the term of imprisonment fixed thereunder runs from the actual delivery at the place of imprisonment pursuant thereto. Any confinement under the void sentence does not apply upon the imprisonment under the second sentence which is not an amendment of the former void judgment and sentence, but the original and only legal judgment and sentence in the case.¹⁹ The time a prisoner spends in the county jail pending a stay of execution is not to be considered in estimating the term of imprisonment, under a judgment directing imprisonment in the state prison, but the time spent in the state prison pending an appeal without supersedeas is to be considered.²⁰

Where defendant is at liberty.—If, after delivery of the defendant at the place of imprisonment and during the term of imprisonment, “the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.”¹ When the penalty is imprisonment, the sentence of the law is to be satisfied only by actual suffering of the imprison-

18. Pen. Code, § 670; *Ex parte McGuire*, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327 (citing Pen. Code, § 670). See *infra*, § 624.

19. *In re Fritz*, 179 Cal. 415, 177 Pac. 157, citing *Ex parte Lee*, 177 Cal. 690, 171 Pac. 958, and over-

ruling *In re Bouchard*, 38 Cal. App. 441, 176 Pac. 692, and *In re Silva*, 38 Cal. App. 98, 175 Pac. 481.

20. *In re Adams*, 81 Cal. 163, 22 Pac. 547.

1. Pen. Code, § 670.

ment imposed, unless remitted by death or by some legal authority. The expiration of time without imprisonment is in no sense an execution of the sentence.² Accordingly, when the prisoner is at large on bail pending an appeal, the time he is at large is not to be credited in estimating the duration of the imprisonment.³ And although the prisoner is released by an unauthorized act of the sheriff without having been discharged by due course of law, the time of his absence from jail cannot be considered as having been in satisfaction of the judgment.⁴ On the other hand, however, the time during which a prisoner is at liberty on parole must be credited to him as time served on the judgment.⁵

§ 624. Cumulative Sentences.—There are two exceptions to the general rule when the term of imprisonment commences to run. One contained in section 105 of the Penal Code applies exclusively to escape from the state prison. The other is contained in section 669 of the same code, which is as follows:

“When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or

2. In re Collins, 8 Cal. App. 367, 97 Pac. 188.

3. Ex parte Ellwood, 41 Cal. 209. See Ex parte Green, 86 Cal. 427, 25 Pac. 21, holding that when a defendant is released on bail pending an appeal from a judgment of the superior court and a judgment of the police court, and upon affirmance of the former judgment he is imprisoned, his term of imprisonment under the latter judgment does not

commence to run until its affirmance.

4. Ex parte Vance, 90 Cal. 208, 13 L. B. A. 574, 27 Pac. 209 (citing cases from other jurisdictions, and holding that the act of the sheriff and the departure of the prisoner from jail is in legal effect a technical escape from which he can derive no advantage.

5. Ex parte Casey, 160 Cal. 357, 116 Pac. 1104.

other subsequent term of imprisonment, as the case may be."⁶

The fact that the legislature has conferred a special power to impose cumulative sentences in two cases implies the absence of such power in other cases.⁷ In all other cases, then, judgments of imprisonment run concurrently.⁸ Section 669 of the Penal Code is limited to cases where a person is convicted of two or more crimes "before sentence has been pronounced upon him for either." In any other case than that described, any direction in the judgment making one sentence cumulative upon another is invalid.⁹

§ 625. Disposition of Property Connected With Crime.

In reference to the keeping and disposition of property which has been stolen or embezzled the code contains the following provisions:

"When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized . . . to direct the disposal thereof."¹⁰

6. Ex parte Kirby, 76 Cal. 514, 18 Pac. 655. See *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498, following *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469, and holding that the court may postpone the time for sentence to await the result of another trial. These cases were decided before the amendment of Pen. Code, § 1191, in 1909, limiting the time for pronouncing sentence.

7. Ex parte McGuire, 135 Cal. 339, 87 Am. St. Rep. 105, 67 Pac. 327; *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469.

8. Ex parte Casey, 160 Cal. 357, 116 Pac. 1104; *Ex parte Green*, 86 Cal. 427, 25 Pac. 21.

9. Ex parte Morton, 132 Cal. 346, 64 Pac. 469.

10. Pen. Code, § 1407. See Pen. Code, §§ 1408, 1409, as to proof of ownership of such property and the duty of the magistrate to order its delivery to the owner upon a proper showing, and on payment of the necessary expenses. *Modern Loan Co. v. Police Court*, 12 Cal. App. 582, 108 Pac. 56 (construing sections 1408 and 1409 in so far as they are made applicable to search-warrant proceedings). See *SEARCH AND SEIZURE*, as to disposal of property in search-warrant proceedings.

"If the property stolen or embezzled has not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner."¹¹

"If the property stolen or embezzled is not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody must, on the payment of the necessary expenses incurred in its preservation, deliver it to the county treasurer, by whom it must be sold and the proceeds paid into the county treasury."¹²

The Penal Code also requires arresting officers to receipt for property taken from a defendant,¹³ and provides for the entry in suitable books of a description of such stolen or embezzled property.¹⁴

§ 626. Prevention of Crime.—The code provides that lawful resistance to the commission of a public offense may be made: "1. By the party about to be injured; 2. By other parties."¹⁵

"Resistance sufficient to prevent the offense may be made by the party about to be injured: 1. To prevent an offense against his person, or his family, or some member thereof. 2. To prevent an illegal attempt by force to take or injure property in his lawful possession."¹⁶

"Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."¹⁷

Public offenses may also be prevented by the intervention of the officers of justice.¹⁸ And when the officers of justice are authorized to act in the prevention of public

11. Pen. Code, § 1410.

12. Pen. Code, § 1411.

13. Pen. Code, § 1412.

14. Pen. Code, § 1413.

15. See Pen. Code, § 692. And generally, see ARREST, vol. 3, p. 134,

as to resistance to arrest; and HOMICIDE, as to right of self-defense.

16. Pen. Code, § 693.

17. Pen. Code, § 694.

18. See Pen. Code, § 697.

offenses, other persons, who, by their command, act in their aid, are justified in so doing.¹⁹

The right of one person to aid another in defending against a threatened offense, as defined by section 694 of the Penal Code, does not differ substantially from the right as it existed under the common law. He cannot interfere except in aid of a lawful resistance by the person threatened.²⁰ When a person makes an attempt to enter the house of another to search for liquor or other property, without a proper search-warrant, the owner of the house is entitled to employ sufficient resistance to prevent the commission of the offense about to be committed, though not to the extent of committing a homicide.¹

W. PROCEEDINGS IN JUSTICES' AND POLICE COURTS AND APPEALS THEREIN.

§ 627. Complaint.—The code provides that

“All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and answer the complaint.”²

The sufficiency of a complaint is to be determined by reference to section 1426 of the Penal Code and not to sec-

19. See Pen. Code, § 698. See Pen. Code, § 720, as to right of officer having the direction of the police to prevent breaches of the peace in certain cases.

20. *People v. Craig*, 152 Cal. 42, 91 Pac. 997.

1. *People v. Ross*, 19 Cal. App. 469, 126 Pac. 375.

2. Pen. Code, § 1426; *In re Grosbois*, 109 Cal. 445, 42 Pac. 444 (the prosecution must be commenced by complaint); *Ex parte Ah Sing*, 87 Cal. 423, 25 Pac. 552 (holding that the omission of an allegation of time does not defeat the jurisdiction of the court). See *supra*, § 70, as to time of filing the complaint. See INDICTMENT AND INFORMATION.

tion 950 of that code, relating to indictments and informations.³ The complaint must contain all the elements of the complete offense.⁴ Ordinarily, it is sufficient to charge the offense in the language of the statute,⁵ although it is not necessary to use the exact language of the statute.⁶ This will not suffice, however, where the language of the statute is so general as to include innocent acts not within its scope and purpose. In such case the charge must be laid according to the true construction of the act.⁷ The complaint need not state statutes and ordinances of which the justice of the peace or police judge takes judicial notice,⁸ and need not conclude with the declaration that the act was contrary to the form, force and effect of the statute.⁹ It should not allege matters of evidence,¹⁰ or mere conclusions of law.¹¹ Since the general jurisdiction of a justice's court runs to the entire county in criminal cases, it is not necessary to insert in the complaint the

3. *Matter of Application of Winston*, 160 Cal. 18, 116 Pac. 390.

4. *In re Jacobs*, 175 Cal. 661, 166 Pac. 801 (complaint under Pen. Code, § 484, held sufficient); *Ex parte Greenall*, 153 Cal. 767, 96 Pac. 804 (complaint for practicing medicine without a license held insufficient); *Ex parte Williams*, 121 Cal. 328, 53 Pac. 706 (complaint under Pen. Code, § 537, held sufficient); *Ex parte Peterson*, 119 Cal. 578, 51 Pac. 859; *People v. Barnes*, 65 Cal. 16, 2 Pac. 493 (complaint for grand larceny of cattle held sufficient); *Ex parte Clark*, 36 Cal. App. Dec. 370, 202 Pac. 50 (complaints for perjury and gaming held insufficient); *In the Matter of Correa*, 36 Cal. App. 512, 172 Pac. 615; *Matter of Application of Worthington*, 21 Cal. App. 497, 132 Pac. 82; *Ex parte Sullivan*, 17 Cal. App. 278, 119 Pac. 526 (holding complaint under Pen. Code, § 269a, to

be insufficient); *In re Avdalas*, 10 Cal. App. 507, 102 Pac. 674 (holding complaint under Pen. Code, § 537, to be sufficient).

5. *People v. Maguire*, 26 Cal. 636; *In re Avdalas*, 10 Cal. App. 507, 102 Pac. 674.

6. *In re Avdalas*, 10 Cal. App. 507, 102 Pac. 674.

7. *Ex parte Peterson*, 119 Cal. 578, 51 Pac. 859.

8. *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258; *Ex parte Luening*, 3 Cal. App. 76, 84 Pac. 445.

It is not a fatal objection that the complaint is inartificial or ungrammatical. *People v. Maguire*, 26 Cal. 636. See JUSTICES OF THE PEACE.

9. *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775.

10. *People v. Maguire*, 26 Cal. 636.

11. *Ex parte Williams*, 121 Cal. 328, 53 Pac. 706.

township where the offense is alleged to have been committed.¹² And it is a rule that the complaint may be verified upon information and belief.¹³

§ 628. Negating Exceptions—Duplicity.—A complaint charging the violation of a penal statute need not negative exceptions stated in the statute unless they are a constituent part of the definition of the crime. If the exception is not a part of the definition of the offense and does not therefore become a part of the enacting clause, it is a matter of defense.¹⁴ And in determining whether the exception is so incorporated with and becomes a part of the enactment as to constitute a part of the definition or description of the offense, it has been held to be immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception and not its location which determines the question.¹⁵ In accordance with this rule, under a statute forbidding the engaging in the practice of dentistry without a license, and providing it shall not affect the right of dentists to practice dentistry who have the right at the time of its passage, the proviso in no degree qualifies the offense created, but simply exempts certain persons from the operation of the statute and need not be negated.¹⁶ So also under a code section prohibiting the malicious injury or destruction of crops and grain “in any case for which a punishment is not otherwise prescribed by this code,” it is not necessary that the

12. Ex parte Kaster, 185 Cal. 647, 198 Pac. 1029.

13. See ARREST, vol. 3, p. 124.

14. Ex parte Hornef, 154 Cal. 355, 97 Pac. 891; In re Hemstreet, 18 Cal. App. 639, 123 Pac. 984; Hogan v. Superior Court, 16 Cal. App. 783,

117 Pac. 947. See, also, INDICTMENT AND INFORMATION.

15. Ex parte Hornef, 154 Cal. 355, 97 Pac. 891.

16. Ex parte Hornef, 154 Cal. 355, 97 Pac. 891, following State v. Flanagan, 24 R. I. 369, 55 Atl. 876.

complaint allege that the case is one for which punishment is not otherwise prescribed.¹⁷

Duplicity.—The complaint should not be duplicitous.¹⁸ But where a statute enumerates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count without rendering the complaint duplicitous, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.¹⁹

§ 629. Warrant or Summons.—If the justice of the peace, or police judge, is satisfied from the complaint that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the form prescribed by statute.²⁰ If it appears that the offense complained of has been committed by a corporation, no warrant of arrest need issue, but the justice of the peace or police judge must issue a summons substantially in the form prescribed in section thirteen hundred and ninety-one of the Penal Code.¹

§ 630. Demurrer, Plea, Dismissal and Docket.—The code provides that the defendant may make the same plea in the justice's or police court, as upon an indictment generally.

“His plea must be oral, and entered in the minutes. If the defendant plead guilty, the court may, before entering

17. *Hogan v. Superior Court*, 16 Cal. App. 783, 117 Pac. 947. See *CROPS*.

18. *Albers v. Superior Court*, 30 Cal. App. 772, 159 Pac. 453 (but holding duplicity does not go to the jurisdiction of the court).

19. *In re Johnson*, 6 Cal. App. 734, 93 Pac. 199, citing *People v. Gusti*, 113 Cal. 177, 45 Pac. 263; *People v. Leyshon*, 108 Cal. 440, 41

Pac. 480; *Ex parte Mogensen*, 5 Cal. App. 596, 90 Pac. 1063 (holding a complaint charging conjunctively in the language of the ordinance all the alternative prohibitions therein contained is sufficient upon habeas corpus); *Platz v. Marion*, 35 Cal. App. 241, 169 Pac. 697.

20. See Pen. Code, § 1427.

1. See Pen. Code, § 1427.

such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appear to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment which may be found against him by the grand jury, or any information which may be filed by the district attorney."²

The code does not provide for a demurrer to test the sufficiency of the complaint, and there is a question whether a court should entertain such a demurrer.³

Dismissal.—Section 1385 of the Penal Code authorizing the dismissal of an action or indictment in furtherance of justice is general in nature and authorizes a dismissal of prosecutions in justices' courts.⁴ But section 1382 of the Penal Code is applicable alone to criminal cases prosecuted by indictment or information and has no reference to the trial of low-grade misdemeanors cognizable in justices' and police courts. Jurisdiction is not lost in such courts by reason of a failure to bring a defendant to trial within the time limited thereby.⁵

§ 631. Change of Venue.—It is provided by the code that if the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences, the grounds of such change of place of trial being specified in the statute.⁶ It is not the imperative duty of a justice to grant a change of venue upon the filing of the affidavit mentioned in the statute. He is called upon to exercise his discretion in determining

2. See Pen. Code, § 1429. See Pen. Code, § 1016, as to pleas to indictment or information generally. See Pen. Code, § 1428, as to duty of justice of the peace or a police judge to keep a docket.

3. *Brown v. Superior Court*, 72 Cal. 14, 13 Pac. 70.

4. *People v. Smith*, 143 Cal. 597, 77 Pac. 449. See *supra*, § 136, where this code section is set out in full.

5. *Albers v. Superior Court*, 30 Cal. App. 772, 159 Pac. 453.

6. Pen. Code, § 1431.

whether the reasons given support the conclusion.⁷ For any abuse of discretion the defendant has a remedy by appeal.⁸ But an error does not deprive the justice of jurisdiction so as to entitle the defendant to relief on habeas corpus⁹ or writ of review.¹⁰ When a prosecution is transferred to another justice of the peace of the same county without the affidavit required by statute, the appearance of the defendant without objection is a waiver of the objection.¹¹

“When a change of place of trial is ordered, the justice must transmit to the justice before whom the trial is to be had all the original papers in the cause, with a certified copy of the minutes of his proceedings; and upon receipt thereof, the justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his court.”¹²

§ 632. Trial Generally.—The defendant must be personally present in the justice or police court before his trial can proceed.¹³ And it is required that after the members of the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public and in the presence of the defendant and if any defendant be not present, the court or justice of the peace by an order or warrant may require the personal attendance of such defendant.¹⁴ It is also a rule in such courts that the court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact.¹⁵

7. *Lowrey v. Hogue*, 85 Cal. 600, 24 Pac. 995; *Miles v. Justice's Court*, 13 Cal. App. 454, 110 Pac. 349.

8. *Lowrey v. Hogue*, 85 Cal. 600, 24 Pac. 995.

9. *Ex parte Wright* (Cal.), 51 Pac. 1100; *Ex parte Wright*, 119 Cal. 401, 51 Pac. 639; *Lowrey v. Hogue*, 85 Cal. 600, 24 Pac. 995.

10. *Miles v. Justice's Court*, 13 Cal. App. 454, 110 Pac. 349.

11. *Ex parte Lou Ah Sun* (Cal.), 7 Pac. 305.

12. Pen. Code, § 1432.

13. See Pen. Code, § 1431.

14. Pen. Code, § 1438.

15. Pen. Code, § 1439.

Right to postponement.—The code provides that before the commencement of a trial in any justice or police court either party may, upon good cause shown, have a reasonable postponement thereof.¹⁶ It is within the jurisdiction of the trial court to determine what constitutes sufficient cause to justify a continuance under the code provision.¹⁷ But any application for a continuance should be made “before the commencement of the trial.”¹⁸

§ 633. Jury and Waiver Thereof.—With reference to jury trials in justices’ and police courts the following provisions appear in the code:

“Upon a plea other than a plea of guilty, if the parties waive a trial by jury, and an adjournment or change of venue is not granted, the court must proceed to try the case.”¹⁹

“A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket. The formation of the jury is provided for in chapter one, title three, part one of the code of Civil Procedure.”²⁰

“The same challenges may be taken by either party to the panel of jurors, or to any individual juror, as on the trial of an indictment for a misdemeanor; but the challenge must in all cases be tried by the court.”¹

The defendant is entitled to a trial by jury, and it is error to deny him a jury trial.² But the error will not entitle him to a discharge upon habeas corpus.³

§ 634. Deliberations of Jury—Verdict.—It is provided that, after hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If

16. See Pen. Code, § 1433.

17. Application of Yung, 7 Cal. App. 772, 96 Pac. 24.

18. People v. Beam, 66 Cal. 394, 5 Pac. 677.

19. Pen. Code, § 1430.

20. Pen. Code, § 1435.

1. Pen. Code, § 1436. See Pen. Code, § 1437, for form of oath to be administered to the jury.

2. Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688.

3. Ex parte Miller, 82 Cal. 454, 22 Pac. 1113.

they do not immediately agree, an officer must be sworn and charged with their custody as the statute prescribes.⁴

“The verdict of the jury must in all cases be general. When the jury have agreed on their verdict, they must deliver it publicly to the court, who must enter [it], or cause it to be entered, in the minutes.”⁵

“When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgement must be entered accordingly, and the case as to the rest may be tried by another jury.”⁶

§ 635. Discharge of Defendant After Acquittal—Costs.

If judgment of acquittal is given, or judgment imposing a fine only, without imprisonment for nonpayment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.⁷ When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same within thirty days after the trial.⁸

§ 636. New Trial and Arrest of Judgment.—It is provided in the code that: “At any time before judgment, defendant may move for a new trial or in arrest of judgment.”⁹

“A new trial may be granted in the following cases:
1. When the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full

4. See Pen. Code, § 1440.

5. Pen. Code, § 1441.

6. Pen. Code, § 1442. See Pen. Code, § 1443, and § 1444, for provisions as to discharge of the jury.

7. Pen. Code, § 1454.

8. Pen. Code, § 1447. And Pen. Code, § 1448, as to entry and enforcement of such judgment against the prosecutor.

9. Pen. Code, § 1450.

knowledge that a trial is being had; 2. When the jury has received any evidence out of court; 3. When the jury has separated without leave of the court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case; 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all of the jurors; 5. When there has been error in the decision of the court, given on any question of law arising during the course of the trial; 6. When the verdict is contrary to law or evidence; 7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground, the defendant must produce at the hearing the affidavits of the witnesses by whom such newly discovered evidence is expected to be given.”¹⁰

A motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had.¹¹

Judgment.

§ 637. In General.—The Penal Code provides that:

“When the defendant pleads guilty, or is convicted, either by the court, or by a jury, the court must render judgment thereon of fine or imprisonment or both, as the case may be.”¹²

“After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless the defendant waive the postponement. If postponed, the court may hold the defendant to bail to appear for judgment.”¹³

10. Pen. Code, § 1451.

12. Pen. Code, § 1445.

11. Pen. Code, § 1452.

13. Pen. Code, § 1449.

"If the judgment is not arrested, or a new trial granted, judgment must be pronounced at the time appointed and entered in the minutes of the court."¹⁴

As in the case of superior courts, a failure to observe the provisions of the statute as to the time of pronouncing sentence does not oust the justice of jurisdiction. It merely renders the judgment erroneous but not void. The error may be corrected by an appeal to the superior court,¹⁵ or in case the judgment was prematurely rendered, the error may be corrected by a vacation of the judgment and rendition of a proper judgment.¹⁶

Suspension of sentence.—It seems that section 1203 of the Penal Code relating to the suspension of execution of sentence applies to proceedings in the justices' courts. Since no intendments are in favor of the judgment of a justice, his authority to issue a commitment after a suspension of sentence must affirmatively appear, that is to say, the record should disclose that the order of suspension was modified or revoked before the commitment was issued.¹⁷

§ 638. Form and Requisites of Judgment.—Where the statute is silent as to the form of the judgment, the court may render its judgment in the form usual to criminal cases.¹⁸ As a general rule, a judgment should be certain and definite and complete in itself, so that what it requires to be done may be known without resort to anything outside the record.¹⁹ Where the crime charged is punishable by fine or imprisonment or both, the judgment must

14. Pen. Code, § 1453.

In an early case it was held questionable whether a legal sentence can be pronounced upon an absent defendant. *Ex parte Wood*, 2 Lab. 58.

15. *In re Hemstreet*, 18 Cal. App. 639, 123 Pac. 984.

16. See *infra*, § 640.

17. *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831.

18. *People v. Forbes*, 22 Cal. 135.

19. *People v. Forbes*, 22 Cal. 135; *Ex parte Wood*, 2 Lab. 58.

specify which punishment is adjudged, and fix the amount of the one or the duration of the other.²⁰ When imprisonment is directed, the judgment should specifically designate the place of confinement,¹ which must correspond with the place fixed by law.²

When a cause is tried before a justice without a jury, he or his court becomes the arbiter of facts, and before a penalty can be imposed, a judgment of guilty must be by him reached and announced.³

§ 639. Imprisonment for Nonpayment of Fine.—Section 1446 of the Penal Code provides

“A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day’s imprisonment for every dollar of the fine.”⁴

This section, like section 1205 of the Penal Code, does not authorize the court, where it imposes imprisonment as well as a fine, as punishment, also to impose the alternative of imprisonment for default in the payment of the fine, but as in the former case, only the provision as to the alternative of imprisonment is void, the remainder of

20. *Ex parte Wood*, 2 Lab. 58.

1. *Ex parte Bargagliotti*, 6 Cal. App. 333, 92 Pac. 96 (holding, however, that an omission to specify the jail was merely a technical error not entitling a defendant to his discharge where it appeared he was confined in the only jail the justice had authority to imprison him in).

2. *Ex parte Sylvester*, 81 Cal. 199, 22 Pac. 550, a judgment fixing a different place of imprisonment from that specified in the statute is a nullity.

3. *Matter of Application of Rob-*

bins, 27 Cal. App. 677, 151 Pac. 14 (holding that a mere statement, “I fine the defendant \$150 or 150 days in jail” without more, is without the necessary predicate to support it).

4. *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530 (holding that this provision applies to recorders’ courts, as such courts are public courts); *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113 (holding that this provision is applicable to a county ordinance, although it does not provide for the alternative of imprisonment); *Ex parte Kelly*, 65 Cal. 154, 3 Pac. 673.

the judgment being valid.⁵ An exception to this rule exists where the law violated specifically provides for a punishment of fine and imprisonment and also imprisonment for nonpayment of fine.⁶

Imprisonment.—Under section 1446 of the Penal Code, it is discretionary with a justice of the peace whether to direct that a defendant be imprisoned for nonpayment of a fine.⁷ The code provision does not in terms limit such imprisonment, when imposed, to the maximum of the period for which imprisonment might be directly imposed as punishment for the offense violated. And prior to 1891 it was held that the court was not so limited.⁸ In that year section 1205 was amended by adding a provision thus limiting the power of the court, but it is uncertain whether this provision is applicable to justices' and police courts, as there are decisions both ways.⁹ So also unlike section 1205 of the Penal Code, section 1446 does not in terms give the magistrate power to fix any rate of imprisonment within the maximum. It has been intimated that the two provisions should be so construed as to give them a harmonious operation. At any rate, if such power should be denied, a judgment fixing a less rate than that specified

5. *Lowrey v. Hogue*, 85 Cal. 600, 24 Pac. 995. See *supra*, § 487.

6. *Ex parte Green*, 94 Cal. 387, 29 Pac. 783 (holding that such a law is valid, and the legality of the imprisonment is unquestionable).

7. *In re Mulholland*, 97 Cal. 527, 32 Pac. 568; *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530.

8. *Ex parte Casey*, 85 Cal. 37, 24 Pac. 599.

9. *In re Mulholland*, 97 Cal. 527, 32 Pac. 568 (decision by Paterson, J., in chambers, to the effect that section 1205 of the Penal Code is

a limitation upon the powers of the superior court only and does not affect the operation of section 1446); *Ex parte Erdmann*, 88 Cal. 579, 26 Pac. 372 (decision in bank holding that section 1205 is applicable to police courts); *In Ex parte Soto*, 88 Cal. 624, 26 Pac. 530, the decision in the *Erdmann* case, *supra*, was cited approvingly in the opinion of Beatty, C. J., but this opinion was not concurred in by a majority of the court, and Garoutte, J., dissenting, states that the court went too far in the *Erdmann* case.

in the statute is within the authority of the statute, and, although erroneous, is not void.¹⁰

Labor during imprisonment.—A justice of the peace or police judge is not authorized in requiring a defendant to labor while imprisoned in default of payment of fine, and any such direction is void,¹¹ although it does not render the entire judgment void.¹²

Place of imprisonment.—The code does not prescribe the place of imprisonment for nonpayment of a fine. Under the so-called Whitney Act,¹³ persons convicted in police courts of offenses committed in cities are required to be imprisoned in the city jail, and there can be no doubt of the power of a police court to direct imprisonment in such jail for nonpayment of fine.¹⁴

Directions in judgment.—The judgment, under section 1446 of the Penal Code, may direct the payment of the fine “forthwith,” as this would be its effect if the word “forthwith” were omitted.¹⁵ The judgment need not in terms provide that the defendant, after suffering a portion of his term of imprisonment, may be discharged upon paying the unsatisfied portion of his fine, if that is its legal effect. Within this rule it has been held that a judgment is valid which orders the payment of a fine of

10. *Ex parte Noble*, 96 Cal. 362, 31 Pac. 224; *Ex parte Soto*, 88 Cal. 624, 26 Pac. 530. The opinion of Beatty, C. J., concurred in by Patterson, and McFarland, J. J., was to the effect that the magistrate possessed the power to require the defendant to be imprisoned at the rate of one day for every two dollars fine. But Judges De Haven, Harrison and Garoutte, were of the opinion the magistrate had no such power.

11. *In re Fil Ki*, 80 Cal. 201, 22 Pac. 146; *Ex parte Kelly*, 65 Cal.

154, 3 Pac. 673 (cited in *Ex parte Arras*, 78 Cal. 304, 20 Pac. 683).

12. In the Matter of Smith, 152 Cal. 566, 93 Pac. 191 (holding that *Ex parte Kelly*, 65 Cal. 154, 3 Pac. 673, has been overruled in so far as it declares the contrary); *Ex parte Halsted*, 89 Cal. 471, 26 Pac. 961.

13. Stats. 1885, p. 214; Stats. 1891, p. 292.

14. *In re Ambrosewf*, 109 Cal. 264, 41 Pac. 1101; *Ex parte Halsted*, 89 Cal. 471, 26 Pac. 961.

15. *Ex parte Noble*, 96 Cal. 362, 31 Pac. 224.

one hundred and fifty dollars and directs the defendant be imprisoned until the fine is paid not exceeding one hundred and fifty days,¹⁶ or which directs that in default of payment of a fine of ten dollars the defendant be imprisoned for a period of ten days.¹⁷

§ 640. Entry and Vacation of Judgment.—The judgment in a justice's or police court should be entered in the docket as soon after its rendition as possible,¹⁸ and it should state the offense of which the defendant was convicted.¹⁹ But as in the case of entries of judgment in the superior court, it is not necessary that the facts contained in the other papers constituting the record in the action be recited in the entry.²⁰ Nor is it necessary that the entry of judgment state the elements of the crime as fully as is required in a complaint,¹ especially when it in terms refers to the complaint in the case.² The justice may correct clerical mistakes in the entry of judgment.³

16. *Matter of Application of Robins*, 27 Cal. App. 677, 151 Pac. 14 (following *Ex parte Riley*, 142 Cal. 124). See *contra*, *Ex parte Baldwin*, 60 Cal. 432, holding void a judgment adjudging "that the defendant pay a fine of fifty dollars or be imprisoned in the county jail of said county for a period of fifty days."

17. *Ex parte Chin Yan*, 60 Cal. 78 (following *Ex parte Ellis*, 54 Cal. 204, which was decided under section 1205 of the Penal Code, notwithstanding the fact that it involved a judgment of a justice of the peace).

18. *Matter of Application of Robins*, 27 Cal. App. 677, 151 Pac. 14.

19. *In re Woo Hah*, 34 Cal. App. 36, 166 Pac. 851 (holding a commitment which recited that the defendant was convicted "of the crime of violating the poison law," while

somewhat indefinite in its description of the offense, was not void); *Ex parte Mogensen*, 5 Cal. App. 596, 90 Pac. 1063 (holding that a judgment contained a sufficient designation of the offense which recited a conviction of violating ordinance No. 130 of the town of Los Gatos, entitled "An Ordinance relative to the Alcoholic Liquor Traffic in said Town of Los Gatos").

20. *Ex parte Raye*, 63 Cal. 491; *Ex parte Mogensen*, 5 Cal. App. 596, 90 Pac. 1063. See *supra*, § 491.

1. *Ex parte Turner*, 75 Cal. 226, 16 Pac. 898 (holding that a judgment is not void because it failed to recite the date of the offense, or that the offense had been "feloniously" committed).

2. *Ex parte Bagshaw*, 152 Cal. 701, 93 Pac. 864.

3. *Ex parte Hornef*, 154 Cal. 355, 97 Pac. 891.

Vacation.—If a judgment rendered is void for any reason, the justice has authority, and it is his duty, to vacate it and render a legal and valid judgment, no commitment having been issued thereon. So also if a judgment is prematurely rendered and is for that reason erroneous, the justice may upon his own motion vacate it and render a proper judgment at some point within which he is authorized to do so.⁴ But after the commencement of the execution of a judgment which is not void, a justice cannot vary its terms adversely to the defendant.⁵

§ 641. Execution of Judgment.—The Penal Code provides that

“When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff, marshal, or other officer, which is a sufficient warrant for its execution.”⁶

And further—

“When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the times specified in the judgment, unless the fine is sooner paid.”⁷

Under section 1455 of the Penal Code, the commitment is only a certified copy of the judgment as rendered and announced.⁸ Under this provision, it becomes the clerk's duty, when a judgment of imprisonment is regularly entered, unless otherwise directed by the police judge or

4. *Matter of Application of Robbins*, 27 Cal. App. 677, 151 Pac. 14. See *supra*, § 637, for the wording of Pen. Code, § 1449, applied in the *Robbins* case, *supra*.

5. *Ex parte Gottschalk*, 32 Cal. App. Dec. 91, 190 Pac. 649 (following *Ex parte Sullivan*, 3 Cal. App. 193, 84 Pac. 781).

6. Pen. Code, § 1455.

7. Pen. Code, § 1456. See Pen. Code, § 1457, as to duty of the officer on payment of the fine, and as to the disposition of the fines.

8. *Matter of Application of Robbins*, 27 Cal. App. 677, 151 Pac. 14. See *In re Woo Hah*, 34 Cal. App. 35, 166 Pac. 851, where the court says: “The judgment of the court as entered is expressed by a recital in the commitment.”

justice of the peace, to make forthwith a certified copy of the judgment and deliver it to the proper officer. Yet so far as the custody of the prisoner is concerned, it is immaterial when this certified copy is delivered to the officer, it being sufficient if he possess duly authenticated evidence of the existence of the judgment.⁹ The justice has a legal right to issue his commitment upon rendering and pronouncing judgment and before it is actually docketed.¹⁰ Commitments issued by justices of the peace of townships run to the sheriff of the county and not to local police officers.¹¹ And a commitment for violation of a municipal ordinance to a city jail which is also used as a branch county jail should be to the custody of the city marshal rather than to that of the sheriff.¹²

Place of imprisonment.—Justices' courts are limited in the execution of their judgments of imprisonment to imprisonment in the county jail, except in those cases where, in certain cities, such courts take cognizance of cases arising under city ordinances.¹³ Police courts under statute are limited to directing imprisonment in a city jail.¹⁴ If a statute defining an offense does not specify the place of imprisonment, but the offense is within the jurisdiction of

9. *In re Nakanishi*, 19 Cal. App. 552, 126 Pac. 508.

10. *Matter of Application of Robbins*, 27 Cal. App. 677, 151 Pac. 14.

11. *In re Dowell*, 36 Cal. App. 587, 172 Pac. 1121.

12. *In re Murphy*, 128 Cal. 29, 60 Pac. 465.

13. *People v. Sacramento Butchers' Protective Assn.*, 12 Cal. App. 471, 107 Pac. 712.

14. *Ex parte Hornef*, 154 Cal. 355, 97 Pac. 891 (police court of the city of Oakland); *In re Ambrosewf*, 109 Cal. 264, 41 Pac. 1101 (under the Whitney Act); *Ex parte*

Halsted, 89 Cal. 471, 26 Pac. 961 (under the Whitney Act); *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006 (under section 12 of the act of 1901 relating to police courts in cities of the one and one-half class). See *County of Sonoma v. Santa Rosa*, 102 Cal. 426, 36 Pac. 810, holding that under the charter of Santa Rosa (Stats. 1875-76, p. 257, § 15), persons violating city ordinances should be committed to the city jail, and those violating criminal statutes should be committed to the county jail, when imprisonment is ordered.

the police court, it follows that the place of imprisonment is in the city jail.¹⁵

Appeals to Superior Courts.

§ 642. In General.—The code provides that

“Either party may appeal to the superior court of the county from a judgment of a justice’s or police court, in like cases and for like cause as appeals may be taken to the supreme court.”¹⁶

No bond upon appeal is required by law, and no liability results from the execution of such a bond.¹⁷ An appeal from a judgment of a justice’s or police court ousts such court of jurisdiction to act further and removes the cause to the superior court.¹⁸ The appeal operates as a suspension of the judgment for all purposes, so that pending the appeal there is no judgment capable of being carried into effect.¹⁹ As no undertaking on appeal is required, the appeal itself operates as a supersedeas, and has the effect of preserving the rights of the parties in the same condition they were prior to the entry of judgment.²⁰

§ 643. Statement on Appeal.—Section 1466 of the Penal Code does not have the effect of making applicable to

15. *Union Ice Co. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006.

When a city leases a portion of the county jail, the portion leased is to all intents and purposes a city jail within the rule. In *re Johnson*, 6 Cal. App. 734, 93 Pac. 199.

16. Pen. Code, § 1466. See *People v. Fowler*, 9 Cal. 85 (holding under former law that appeal lay to the county court). See Pen. Code, § 1467, as to the time within which appeal may be taken.

17. *People v. Cabannes*, 20 Cal. 526.

18. *Matter of Application of Howell*, 29 Cal. App. 668, 157 Pac. 553 (holding that pending an appeal a justice cannot issue a jail commitment until some order of the superior court, even though it might follow that the appeal should be dismissed for lack of a sufficient record on which to present any available question).

19. *People v. Treadwell*, 66 Cal. 400, 5 Pac. 686.

20. *Spears v. County of Modoc*, 101 Cal. 303, 35 Pac. 869.

appeals to the superior court all of the provisions of the code respecting the preparation of the record to be used on appeal as outlined in title IX of that code.¹ The record is to be prepared as provided in section 1468 of the Penal Code, which is as follows:

“The appeal to the superior court from the judgment of a justice’s or police court is heard upon a statement of the case settled by the justice or police judge, embodying such rulings of the court as are excepted to, which statement must be filed with and settled by the court within ten days after filing notice of appeal.”²

The Criminal Practice Act provided that the appeal should be heard upon a statement settled by the justice, police judge, recorder or mayor embodying the evidence and such rulings as were excepted to.³ It was held that the provision in the Practice Act did not apply where the rulings alleged to be erroneous appeared on the face of the judgment-roll. A statement was necessary where the error did not so appear, for in no other way except by a trial *dè novo*, could it be brought to the notice of the appellate court.⁴

§ 644. Hearing and Disposition of Appeal and Proceedings Thereafter.—If a new trial is granted upon appeal from a justice’s or police court, it must be had in the superior court.⁵

“If the appeal is dismissed or the judgment affirmed, a copy of the order of dismissal or judgment of affirmance

1. Matter of Application of Howell, 29 Cal. App. 668, 157 Pac. 553.

2. See *Ex parte Gottschalk*, 32 Cal. App. Dec. 91, 190 Pac. 649, holding that where the case has been appealed and a new trial has been denied, it is competent for a district court of appeal or superior court upon habeas corpus to look into the facts as presented in a

statement on appeal for the purpose of aiding it in determining whether the justice exceeded his jurisdiction in pronouncing judgment.

3. Stats. 1858, p. 218, § 3.

4. *Morley v. Elkins*, 37 Cal. 454; *People v. Maguire*, 26 Cal. 635.

5. See Pen. Code, § 1469. *Taylor v. Reynolds*, 92 Cal. 573, 28 Pac. 688.

must be remitted to the court below, which may proceed to enforce its sentence."⁶

It is not necessary that the defendant or his counsel have notice when the judgment of affirmance will be entered or that he be present at the decision.⁷ although it is improper to decide the case without first making an order submitting it for decision.⁸ The superior court is not required to wait ten days before transmitting its findings and judgment to the court from which the appeal was taken, but under sections 1264 and 1467 of the Penal Code must forthwith remit them to the lower court.⁹ The commitment after an affirmance of judgment on appeal need not recite the judgment of the appellate court or that a remittitur had been issued. In such case, it need only recite the judgment of conviction, and state that the defendant appealed and that the judgment was affirmed.¹⁰ After an affirmance of the judgment there is no appeal pending in the superior court, and a subsequent decision purporting to reverse the judgment is void.¹¹

Upon an appeal from a justice's or police court from an order sustaining a demurrer, the superior court on reversing the order is not authorized to order a trial in that court, as that would be an attempt to make the superior court a court of original jurisdiction in such case. Under section 1467 of the Penal Code, the superior court has full power to transmit its rulings and directions to the justice's court for further proceedings in the case.¹²

6. Pen. Code, § 1470.

7. *La Porte v. Williams*, 17 Cal. App. 428, 120 Pac. 55.

8. *Wilson v. Superior Court*, 6 Cal. Unrep. 766, 65 Pac. 1027 (holding, however, that a failure to make an order submitting the case for decision does not render the judgment void).

9. *La Porte v. Williams*, 17 Cal. App. 428, 120 Pac. 55.

10. *Ex parte Jones*, 41 Cal. 209.

Upon the affirmance or dismissal of the appeal the defendant must be recommitted to prison. *Ex parte Whitty*, 65 Cal. 168, 3 Pac. 660 (holding that a failure to file a certificate of probable cause was immaterial and that the defendant must be recommitted).

11. *Wilson v. Superior Court*, 6 Cal. Unrep. 713, 65 Pac. 575.

12. *Brown v. Superior Court*, 72 Cal. 14, 13 Pac. 70.

CROPS.

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-

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Cases are cited in this article to and including 185 Cal., 45 Cal. App. and 205 Pac.

III. Sale or Reservation of Crops.

20. Sale as Affected by Statute of Frauds.
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36. Damage from Breach of Contract to Farm on Shares.

I. INTRODUCTORY.

§ 1. **Scope of Article.**—The law of crops as herein discussed concerns their nature, and the right and title thereto as affected or determined by the ownership of, or various interests in, the land from which they are produced. It includes a treatment of the rights and obligations arising out of contracts to farm land on shares, but excludes a discussion of sales,¹ and mortgages,² in so

1. See *infra*, §§ 2, 19, 20; and see generally, SALES.

2. See *infra*, § 2; and see, generally, CHATTEL MORTGAGES.

far as there is involved only the principles of general law applicable to those transactions. It also omits a discussion of cases which, while they incidentally involve the subject crops, decide no principle of law specially applicable thereto,³ and excludes discussion of the nature or relation of the various interests in land except as they bear upon or affect rights and interest in and to the crops grown thereon. Such matters are considered in other articles.⁴ The laws enacted for the encouragement and protection of agricultural and horticultural industries are discussed elsewhere;⁵ as are all questions involving rights in and to growing trees and shrubbery and the cutting thereof from the land.⁶ The question of measure of damages for destroyed or injured crops is peculiarly appropriate to this subject and has been fully considered in this article.⁷

Co-operative crop-marketing associations.—In California of late years many co-operative marketing associations have been formed for the purpose primarily of stabilizing the great farming industries of the state and maintaining reasonable prices. The subject of the legality of such contracts involves matters beyond the specific scope of this article and hence is treated elsewhere in this work.⁸ However, it may not be out of place to note in passing that contracts with associations of this character are tested by the rule of reason in California as to whether or not they are in their nature legitimate or unlawful combinations. Generally speaking, the public welfare is first considered and if it be not involved and the restraint upon one party is no greater than the protection of the other party requires, the contract may be sustained. The ques-

3. *Kimball v. Swenson*, 34 Cal. App. Dec. 493, 196 Pac. 781. See *PARTNERSHIP*. *Edwards v. Arp*, 173 Cal. 472, 160 Pac. 551. See *VENDOR AND PURCHASER*.

4. See *ADVERSE POSSESSION*, vol. 1, p. 495 et seq.; *COTENANCY*, vol. 7,

p. 328; *HOMESTEADS; LANDLORD AND TENANT*.

5. See *AGRICULTURE*, vol. 1, p. 869.

6. See *LOGS AND TIMBER*.

7. See *infra*, § 30 et seq.

8. See *MONOPOLIES AND COMBINATIONS*.

tion is whether under the peculiar circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not unreasonable.⁹

§ 2. Definitions.—The etymology of the word “crop” appears to be from the Saxon “crop” or “cropp,” signifying the crop of a fowl, a cluster of ears of corn or grapes; and from the Welsh, “copiad,” a gathering or taking hold of. By lexicographers “crop” is defined as “that which is gathered from a single field or of a single kind of grain or fruit, for a single season—fruit harvest.” The word is nearly synonymous with emblements. It is at least doubtful if, under the common and restrictive acceptance of the term, anything more would be understood than products from annual plants, as cereals, maize, etc., and the latter appears to be the sense in which the term is employed in technical legal parlance. However, at the present day, in California, at least, the word “crop,” taken in its most comprehensive sense, includes fruit grown on trees, but never the trees themselves,¹⁰ and it is in this comprehensive sense that the word is used in this article. The terms “cropper,” “cropping contract,” “periodical crops” and “perennial crops,” are used in the sense in which they are defined in the dictionaries. Perennial crops within the meaning of that term have been held to include those of alfalfa,¹¹ and asparagus.¹²

§ 3. Crops as Property in General.—Growing, or matured, but unsevered, crops may be either personal or real property according to circumstances.¹³ They are a part

9. See article by Stanley M. Arndt, in Cal. Law Rev., vol. 8, p. 281 et seq.

10. Cottle v. Spitzer, 65 Cal. 456, 52 Am. Rep. 305, 4 Pac. 435. See *infra*, § 4, as to exemption of crops from taxation, and as to fruit trees themselves not within the exemption.

11. Cottle v. Spitzer, 65 Cal. 456, 52 Am. Rep. 305, 4 Pac. 435.

12. Meek v. Cunha, 8 Cal. App. 98, 96 Pac. 107.

13. Wilson v. White, 161 Cal. 453, 119 Pac. 895; Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484;

of and pass with the land by a voluntary conveyance,¹⁴ by judicial sale,¹⁵ and to the successful plaintiff in an action of ejectment.¹⁶ They are subject to a real estate mortgage unless severed before delivery of the deed to the purchaser upon foreclosure and sale;¹⁷ and they also partake of the nature of the homestead exemption when growing on homestead premises.¹⁸ On the other hand, present growing crops,¹⁹ as well as crops to be grown in the future,²⁰ are subject to absolute sale and contract of sale independently of the land, and in the case of periodical crops—fructus industriales—such sales are not required to be in writing within the statute of frauds.¹ So, too, present growing crops,² as well as crops to be grown in

Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33.

14. See *infra*, § 6.

15. See *infra*, § 18.

16. See *infra*, § 8.

17. See *infra*, § 9.

18. See *infra*, § 19.

19. Jones v. California Growers & Shippers, 182 Cal. 777, 190 Pac. 172; Jones v. California G. & S. Inc., 182 Cal. 777, 190 Pac. 172; Arnold v. Producers' Fruit Co., 128 Cal. 637, 61 Pac. 283; Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462; O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130; Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Brown v. Anderson, 77 Cal. 236, 19 Pac. 487; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Globe Grain etc. Co. v. Drenth, 36 Cal. App. 156, 171 Pac. 821; Marshall v. Ferguson, 23 Cal. 65; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Rosenberg Bros. & Co. v. Ross, 6 Cal. App. 755, 93 Pac. 284; Bours v. Webster, 6 Cal. 661; Richmond-Chase Co. v. Schlesinger, 36 Cal. App. Dec. 673, 203 Pac. 418; Peterkin v. Randolph Marketing Co., 32 Cal. App. 632,

191 Pac. 947; Miller v. Hunt, Hatch & Co., 32 Cal. App. Dec. 387, 191 Pac. 75; Wong Foo v. Southern Pac. Co., 41 Cal. App. 42, 181 Pac. 823; Kimball v. Swenson, 34 Cal. App. Dec. 493, 196 Pac. 781; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134; Griffith v. Welbanks & Co., 29 Cal. App. 238, 155 Pac. 120; Foote v. San Francisco Produce Co., 25 Cal. App. 787, 145 Pac. 730; Pfoh v. Porter, 23 Cal. App. 59, 137 Pac. 44.

20. Cutting Packing Co. v. The Packers' Exchange, 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52; Brown v. Anderson, 77 Cal. 236, 19 Pac. 487; Blackwood v. Cutting Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248; Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Hogue-Kellogg Co. v. Petit, 32 Cal. App. Dec. 834, 192 Pac. 113; Hogue-Kellogg Co. v. Baker, 32 Cal. App. Dec. 56, 190 Pac. 493; Hamilton v. Klinke, 42 Cal. App. 426, 183 Pac. 675.

1. Civ. Code, § 1624.

2. Sousa v. Lucas, 156 Cal. 460, 105 Pac. 413; Summerville v. Stock-

the future,³ are subject to chattel mortgage by code provisions.⁴ It is said that the legislature by such provisions intended to declare that for such purpose growing crops should be regarded as chattels.⁵ Growing crops, under the code provisions for attachment, are attachable as personal property not capable of manual delivery,⁶ and may

ton Milling Co., 142 Cal. 529, 76 Pac. 243; 144 Cal. 155, 77 Pac. 889; Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552; Bank of Woodland v. Duncan, 117 Cal. 412, 49 Pac. 414; Simpson v. Ferguson, 112 Cal. 180, 52 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Cardenas v. Miller, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472; Horgan v. Zannetta, 107 Cal. 27, 40 Pac. 22; Treat v. Dorman, 100 Cal. 623, 35 Pac. 86; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020; Harms v. Silva, 91 Cal. 636, 27 Pac. 1088; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Campodonico v. Oregon Imp. Co., 87 Cal. 566, 25 Pac. 763; Grangers' etc. Assn. v. Clark, 84 Cal. 201, 23 Pac. 1081; Byrnes v. Hatch, 77 Cal. 241, 19 Pac. 482; Wilson v. Prouty, 70 Cal. 196, 11 Pac. 608; Wood v. Franks, 67 Cal. 32, 7 Pac. 50; Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33; Sunol v. Molly, 63 Cal. 369; Martin v. Thompson, 63 Cal. 3; Wood v. Franks, 56 Cal. 217; Perkins v. Eckert, 55 Cal. 400; Rider v. Edgar, 54 Cal. 127; Lovensohn v. Ward, 45 Cal. 8; Goodyear v. Williston, 42 Cal. 11; Crosby v. Fresno Fruit etc. Co., 30 Cal. App. 308, 158 Pac. 1070; Quiriauque v. Dennis, 24 Cal. 154; Bailey v. Sward, 184 Cal. 395, 193 Pac. 952; McCormick v. Farmers' Grain & M. Co., 34 Cal. App.

Dec. 624, 197 Pac. 429; Ramsey v. California Packing Corp., 34 Cal. App. Dec. 581, 201 Pac. 481; Hayashi v. Pacific Fruit Exchange, 43 Cal. App. 677, 186 Pac. 174; Moosios v. Rusconi, 37 Cal. App. 471, 174 Pac. 92; Ramsey v. California Packing Corp., 34 Cal. App. 581, 201 Pac. 481; McCormick v. Farmers' Grain & M. Co., 34 Cal. App. 624, 197 Pac. 429; Morrow v. Wells, 30 Cal. App. 306, 158 Pac. 226; Gates v. Tom Quong, 3 Cal. App. 443, 85 Pac. 662.

3. Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679; Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801; Hall v. Glass, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 336; Irwin v. McDowell, 91 Cal. 119, 27 Pac. 601; Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Crosby v. Fresno Fruit etc. Co., 30 Cal. 308, 158 Pac. 1070; Hayashi v. Pacific Fruit Exchange, 43 Cal. App. 677, 186 Pac. 174.

4. Civ. Code, §§ 2955, 2956, 2957. See *infra*, § 10; and see CHATTEL MORTGAGES, vol. 5, p. 46 et seq.

5. Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484. See, generally, PROPERTY.

6. Code Civ. Proc., § 542, subd. 5; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Schell v. Simon, 66 Cal. 264, 5 Pac. 238; Raventas v. Green, 57 Cal. 254; Quiriauque v. Dennis, 24 Cal. 154; Moosios v. Rusconi, 37 Cal. App. 471, 174 Pac.

be levied upon and sold under execution.⁷ But not being susceptible of manual delivery until harvested, they are not subject to the code provision against fraudulent transfers.⁸

§ 4. Crops as Taxable Property.—Growing crops in general are exempt from taxation in this state by constitutional and statutory provisions.⁹ But fruit, nut-bearing, and ornamental trees, and vines not of annual growth, are not “growing crops” within the exemption.¹⁰ Similarly, alfalfa, being a perennial plant, does not, as respects its permanent growth, come within the exemption. Nor was alfalfa included in “improvements on land” as defined by section 3617 of the Political Code, prior to the amendment of that section in 1905.¹¹ But since that amendment, alfalfa has been made taxable as an improvement on land.¹² It has been suggested that the constitutional exemption of growing crops is, in effect, a declaration that, being in a transitory state, they are not sufficiently tangible to be treated as taxable property.¹³

§ 5. Malicious Injury as Crime.—It is provided in section 600 of the Penal Code that “Every person who willfully and maliciously burns . . . any growing or standing grain, grass,” etc., “is punishable by imprisonment in the state prison for not less than one year, nor more than ten years.” Section 602, subdivision 3, of the same code provides that “Every person who willfully commits any tres-

92; *Globe Grain & M. Co. v. Drenth*, 36 Cal. App. 156, 171 Pac. 821. See *LEVY AND SEIZURE*.

7. Code Civ. Proc., § 688; *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619; *Schell v. Simon*, 66 Cal. 264, 5 Pac. 238; see *EXECUTIONS; LEVY AND SEIZURE*.

8. See *infra*, § 20.

9. Const., art. XIII, § 1; Pol. Code, § 3607.

10. *Cottle v. Spitzer*, 65 Cal. 456, 52 Am. Rep. 305, 4 Pac. 435.

11. See Stats. 1905, p. 192; *Miller v. County of Kern*, 137 Cal. 516, 70 Pac. 549.

12. Pol. Code, § 3617.

13. *Cottle v. Spitzer*, 65 Cal. 456, 52 Am. Rep. 305, 4 Pac. 435.

pass by . . . maliciously injuring or severing from the freehold of another anything attached thereto, or the produce thereof, . . . is guilty of a misdemeanor." And in section 604 it is further provided that "Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this code, is guilty of a misdemeanor." The words "in any case for which a punishment is not otherwise prescribed by the code, is guilty of a misdemeanor," contained in the last provision above quoted, have been construed to mean simply that in case no other punishment is elsewhere prescribed, the crime defined shall be punished as a misdemeanor by the infliction of the penalty prescribed therefor in section 19 of the Penal Code. The "exception" in section 604 of the Penal Code thus indicated constitutes no essential part of the description of the crime therein defined. While sections 600 and 602, as shown by the above excerpts, define similar crimes, they are, nevertheless, distinct crimes, and not exceptional to the offense described in section 604.¹⁴

II. RIGHT TO CROPS.

§ 6. Between Vendor and Purchaser.—It is elementary law that as between the vendor and vendee of real property having a growing crop thereon, such crop constitutes a part of the realty, and in the case of a voluntary conveyance of the land passes to the grantee,¹⁵ unless specially

14. *Hogan v. Superior Court*, 16 Cal. App. 783, 117 Pac. 947 (holding, in passing upon the sufficiency of a criminal complaint based upon section 604 of the Penal Code, that in pleading the offense defined in that section, it was not necessary to make any reference in the com-

plaint to the other two sections). See CRIMINAL LAW, vol. 8, p. 662; FIRES.

15. *Wilson v. White*, 161 Cal. 453, 119 Pac. 895; *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705; *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430; *Lewis v. Hall*, 38 Cal. App.

reserved by the grantor;¹⁶ provided, of course, there has not been a constructive severance.¹⁷ And where a contract for the sale of land makes no reservation of the growing crops, the vendor is bound to convey the land with the crops.¹⁸ So an offer merely to purchase the land is an offer to include the ungathered crop as going with it.¹⁹ One who is placed in possession of land under an exchange agreement pending the delivery of deeds out of escrow, and defrays the expenses of caring for and gathering a growing crop, is the owner thereof and entitled to the proceeds,²⁰ the deeds upon delivery relating back to the date of their execution.¹ And it seems that where the right of possession is given to the purchaser in a contract of sale, he becomes the owner of the crops growing upon the land when the contract of sale is made.² The passing of title to the crops in these cases, when there has been no actual conveyance of the land, is based on the equitable doctrine that equity treats a thing agreed to be done as actually performed. But where a purchaser of land under contract made no effort to perform on his part, and having never been in possession, or made demand for possession, it was held that he had no right to a volunteer crop of grain growing on the land at the time of the execution of the con-

329, 176 Pac. 171; *Morrow v. Wells*, 30 Cal. App. 306, 158 Pac. 226.

16. *Wilson v. White*, 161 Cal. 453, 119 Pac. 895; *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705 (holding that the life estate reserved by the grantor had its common-law incident as to emblements unless cut off by the terms of the deed. See *infra*, § 16); *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430; *Lewis v. Hall*, 38 Cal. App. 329, 176 Pac. 171.

17. *Wilson v. White*, 161 Cal. 453, 119 Pac. 895.

18. *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430. See *infra*, § 21, as to effect of parol reservation of crops.

19. *Wilson v. White*, 161 Cal. 453, 119 Pac. 895.

20. *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364 (but holding that the vendor could counterclaim for moneys expended in producing the crop prior to delivery of possession, in an action brought against him by the purchaser for wrongfully taking and selling the crop). See *infra*, § 7.

1. See DEEDS.

2. *Lewis v. Hall*, 38 Cal. App. 329, 176 Pac. 171 (referred to but not decided).

tract, the court applying the rule that an equitable principle would not be applied to defeat equity.³

Installment payments secured by crop mortgage.—Where a contract to purchase land provides that the price shall be paid in certain installments, and a crop mortgage is given by the vendee to secure payment of the amounts, both instruments being made at the same time, they are, in effect, one contract, and do not warrant the vendor in applying the proceeds of the whole crop on such price. The manifest intention of the parties in such case is to have the profits of the land insure the payments of specific amounts at specific times, as provided in the contract.⁴

§ 7. Between Land Owner and Trespasser or Disseizor.

The rule applicable to crops grown and harvested upon land by a trespasser, or one in unlawful possession, not under circumstances to justify exemplary damages, would seem to be that if the possession is recovered by the owner, he takes the growing crops with the land; but that crops harvested are the property of the one in unlawful possession.⁵ But this rule does not apply to a mere trespasser who casually or temporarily enters for the purpose of growing or harvesting crops.⁶ One must be in the actual, exclusive and adverse possession of the land in order to invoke the rule.⁷ The right of the land owner in or to such crops has been denied in actions of replevin brought

3. *Lewis v. Hall*, 38 Cal. App. 329, 176 Pac. 171. See *EQUITY*.

4. *Morrow v. Wells*, 30 Cal. App. 306, 158 Pac. 226.

5. *Rector v. Lewis*, 31 Cal. App. Dec. 507, 188 Pac. 1018.

6. *Johnston v. Fish*, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663; *West v. Smith*, 52 Cal. 322; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Page v.*

Fowler, 37 Cal. 100; S. C., 23 Cal. 605 (holding that mere cutting of grass on land is not evidence of actual possession).

7. *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021; *Emerson v. Whitaker*, 83 Cal. 147, 23 Pac. 285; *Smith v. Cunningham*, 67 Cal. 262, 7 Pac. 679; *Martin v. Thompson*, 63 Cal. 3; *Pennybecker v. McDougal*, 46 Cal. 661. And see cases cited supra. See *ADVERSE POSSESSION*, vol. 1, p. 527 et seq.

against the wrongful occupant to recover the crops;⁸ in actions wherein the owner claimed the right to recover the value of the crops as damages for the use and occupation of the land;⁹ in an action of ejectment and for damages for the conversion of the crop by the occupant;¹⁰ and in an action involving the right of a creditor of the owner to attach the crops as the property of the owner.¹¹

It follows that the wrongful occupant may dispose of the crops during the period of his possession, and persons dealing with him, therefore, become the owners of what is purchased from him. Moreover, their title is not affected by the subsequent determination of an ejectment suit in favor of the rightful owner of the land, or by a judgment of replevin obtained by such owner against the occupant for the crops, in a suit in which possession of the crops had been delivered to the owner; and it is not material that the purchaser of the crops at the time of the purchase knew that the plaintiff in the ejectment suit claimed to be the owner.¹² The right to the fruits of the land does not depend upon the amount of labor expended by the occupant in their production, and it is immaterial whether a crop cut from the land was a volunteer crop or had been sown under a cropping contract with the occupant; likewise, the fruits gathered belong to him as fully as the crops. The owner's remedy against the unlawful occupant is to recover the value of the use and occupation of the land during the period in which possession was wrongfully withheld;¹³ and the occupant is not entitled to

8. *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021; *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663; *Pennybecker v. McDougal*, 46 Cal. 661; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Page v. Fowler*, 37 Cal. 100; S. C., 28 Cal. 605.

9. *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Rector v. Lewis*, 31 Cal. App. 507, 188 Pac. 1018.

10. *Johnston v. Fish*, 105 Cal. 420, 38 Pac. 979.

11. *Smith v. Cunningham*, 67 Cal. 262, 7 Pac. 679.

12. *Johnston v. Fish*, 105 Cal. 420, 38 Pac. 979. As to effect of judgment in ejectment or right to growing crops, see *infra*, § 8.

13. *Johnston v. Fish*, 105 Cal. 420, 38 Pac. 979; *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021; *Mahoney*

an accounting to determine how much he may have actually realized from his wrongful occupation, after deducting the necessary expenses of carrying on the farm.¹⁴

Reason for the rule.—The reason generally given for denying the right of the owner of land to crops gathered by one in adverse possession is, that a personal action cannot be made the means of litigating and determining the title to real property.¹⁵ But it is also said that the fact that the owner can recover the rents and profits of the land—being the value of the use and occupation thereof—shows that he cannot recover the crops. The annual crops which contain both the value of the use of the land and the labor of the farmer do not, under such circumstances, belong to the owner of the land.¹⁶ “It would be an oppressive rule to require everyone who, after years of litigation perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce.”¹⁷

v. Bostwick, 96 Cal. 53, 30 Pac. 1020; Pennybecker v. McDougal, 46 Cal. 661; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Rector v. Lewis, 31 Cal. App. Dec. 507, 188 Pac. 1018.

14. Mahoney v. Bostwick, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020.

15. Ophir Silver etc. Co. v. Superior Court, 147 Cal. 467, 3 Ann. Cas. 340, 82 Pac. 70 (a case of severance of minerals but stating the general rule); Smith v. Cunningham, 67 Cal. 262, 7 Pac. 679; Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Page

v. Fowler, 37 Cal. 100; S. C., 28 Cal. 605.

16. Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Rector v. Lewis, 31 Cal. App. Dec. 507, 188 Pac. 1018.

17. Johnston v. Fish, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462 (the court saying: “I think I have shown there are reasons for the rule which are not derived from the feudal relation or founded upon the over-nice technicalities of the common law, nor yet upon the reason most frequently given for the rule: that title cannot be tried in a mere transitory action”).

§ 8. Between Occupant and Successful Plaintiff in Ejectment.—While one in the wrongful occupation of land is, as a rule, entitled to the crops grown and harvested by him under the principles laid down in the preceding section, still, where the owner of the land is entitled to recover possession thereof in an action of ejectment, he is also entitled to the crops growing thereon. As between such occupant and the successful plaintiff in the ejectment suit the growing crops are a part of the realty and pass to the plaintiff.¹⁸ And such is generally recognized as the true rule.¹⁹ Also where one has taken a mortgage on the growing crops from the occupant during the pendency of an action of ejectment, he is bound by the judgment against the mortgagor for the restitution of the premises, and is not entitled to possession for the purpose of harvesting the crops.²⁰

§ 9. Between Mortgagor and Mortgagee Prior to Sale.—An ordinary real estate mortgage gives to the mortgagee no right of possession of the land, and creates no lien upon or right to crops not growing thereon at the time of foreclosure and sale,¹ and if the mortgagee wrongfully enters and ousts the mortgagor from the premises he is liable as a disseizor.² While a mortgage upon the land, together with its “rents, issues, and profits,” is deemed

18. *Huerstal v. Muir*, 64 Cal. 450, 2 Pac. 33; *Corcoran v. Doll*, 35 Cal. 476. See EJECTMENT.

19. 8 Ruling Case Law, p. 367.

20. *Huerstal v. Muir*, 64 Cal. 450, 2 Pac. 33.

1. *Gregory v. Clabrough's Exrs.*, 129 Cal. 475, 62 Pac. 72 (holding that proceeds of crops harvested before foreclosure, which were paid to the mortgagee under the belief and mutual mistake of law that he was entitled thereto, could be recovered as moneys paid for the

use of the mortgagor); *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993; *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *West v. Conant*, 100 Cal. 231, 34 Pac. 705; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Bank of Woodland v. Christie*, 6 Cal. Unrep. 545, 62 Pac. 400.

2. See *supra*, § 7.

to pledge the growing crops as security for the debt,³ and gives the mortgagee the abstract right upon foreclosure to have the entire property sold,⁴ it is limited in its effect, so far as growing crops are concerned, to crops growing upon the land at the time of foreclosure, and does not vest in the mortgagee a right to the crop grown intermediate the giving of the mortgage and its foreclosure. The mortgagor is entitled to such crops, and may exercise an absolute dominion over them the same as if the mortgage did not exist.⁵ Even if the rents and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right of the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver.⁶

§ 10. Between Mortgagor and Purchaser During Period of Redemption.—The courts of California have repeatedly held that the owner in possession of mortgaged lands has the right to retain and harvest the crops grown and ripened pending the time of redemption,⁷ the sheriff's cer-

3. *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Treat v. Dorman*, 100 Cal. 623, 35 Pac. 86; *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414.

4. *Treat v. Dorman*, 100 Cal. 623, 35 Pac. 86.

5. *Gregory v. Clabrough's Exrs.*, 129 Cal. 475, 62 Pac. 72; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Bank of*

Woodland v. Christie, 6 Cal. Unrep. 545, 62 Pac. 400.

6. *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484 (reserving the question whether or not a mortgage of land, together with the "rents, issues and profits thereof," would create a lien in favor of the mortgagee upon all crops that might thereafter grow upon the land during the life of the mortgage). See, also, *MORTGAGES*.

7. *Sullivan v. Superior Court*, 185 Cal. 133, 195 Pac. 1061; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006; *Scott v.*

tificate passing no interest in such crops.⁸ In a case where the mortgage covers the rents, issues and profits, it has been held that where the purchaser at foreclosure sale is rightfully in possession, either through a receiver appointed by the court or personally, the owner in an action for restitution of the property, upon reversal of the decree of foreclosure, cannot recover the rents and profits accruing either during such possession or after the appointment of the receiver. His only remedy is to have them applied on the mortgage debt.⁹ By statutory provision the purchaser at foreclosure sale is entitled to receive from the tenant in possession the rents, or the value of the use and occupation, of the property during the period of redemption.¹⁰ But where the mortgagor as lessor was entitled to receive from the tenant in possession of the premises a certain share of the products of the soil to be delivered annually as rent, and which became due and payable for the year after the purchase at foreclosure sale and during the period of redemption, it has been held that the purchaser was not entitled to the whole annual rent, but only to an apportionment of a share of that rent in proportion to the unexpired part of the lease year existing after the purchase.¹¹

§ 11. Between Mortgagee and Purchaser or Encumbrancer of Crop.—A distinction is made between the rents and profits, as such, and the corpus of the growing crops, it being held that the statutory mode of mortgaging crops as chattels is exclusive,¹² and that a clause mort-

Hotchkiss, 115 Cal. 89, 47 Pac. 45; Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; West v. Conant, 100 Cal. 231, 34 Pac. 705.

8. Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74.

9. Cowdery v. London etc. Co., 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

10. Code Civ. Proc., § 707.

11. Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74. See, generally, MORTGAGES.

12. Civ. Code, §§ 2955, 2956. See cases cited infra, this section, and see CHATTEL MORTGAGES, vol. 5, p. 47.

gaging the "rents, issues, and profits," in a mortgage not executed in the form prescribed for chattel mortgages, is ineffectual to give the mortgagee any lien on, or right to, the growing crops, even after the appointment of a receiver,¹³ as against third persons, who are in the position of purchasers for value with or without notice.¹⁴ It is said that no amount of notice of such mortgage could give to it the effect of a chattel mortgage on the crops as against third persons,¹⁵ the clause relating to "rents, issues and profits" being absolutely void as far as the rights of third persons are concerned.¹⁶ But there are cases in which the matter of notice and good faith have been treated as being material.¹⁷

§ 12. Authority of Receiver to Sell and Apply on Mortgage Debt.—Where a mortgage is a valid lien upon the rents, issues and profits, a receiver may be appointed to take possession of and sell the crops and apply the proceeds on the mortgage debt.¹⁸ But a receiver appointed

13. *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Modesto Bank v. Owens*, 121 Cal. 223, 53 Pac. 552; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484 (distinguishing *Treat v. Dorman*, 100 Cal. 623, 35 Pac. 86, on the ground that the point as to the manner of execution of the mortgage was not raised in that case).

14. *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Modesto Bank v. Owens*, 121 Cal. 223, 53 Pac. 552.

15. *Modesto Bank v. Owens*, 121 Cal. 223, 53 Pac. 552 (pointing out that *Simpson v. Ferguson*, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, holds that such a mortgage does

not constitute a lien upon the growing crops, even as against the mortgagor).

16. *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484.

17. *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Treat v. Dorman*, 100 Cal. 623, 35 Pac. 86 (the question of manner of execution of the mortgage not being raised).

18. *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; *Modesto Bank v. Owens*, 121 Cal. 223, 53 Pac. 552; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45; *Treat v. Dorman*, 100 Cal.

in an action to foreclose a mortgage, which does not in terms cover the rents, issues and profits of the mortgaged premises, cannot be properly directed to apply the proceeds of the growing crops to the deficiency judgment, where the decree was not entered until the crops were gathered. It was not intended by section 564 of the Code of Civil Procedure to create, by the mere appointment of a receiver, a new lien not before existing; and when he is appointed for any legitimate purpose, he cannot be directed to take possession of the crops of the mortgagor upon which no lien previously existed. Any other view as to the powers of the receiver would in effect create a new contract for the parties, and give a lien on property not included in the mortgage.¹⁹ Nor does an order appointing a receiver constitute ipso facto a possession of any property which the party at whose instance the appointment is made has no estate in, or right to, or lien upon, prior to and independent of the appointment of the receiver. Such an order made in a suit for the foreclosure of a mortgage of land which creates no lien upon the growing crops confers no possession thereof upon the receiver prior to an act upon his part taking possession of the crop.²⁰ Thus, where an assignee of the owner of the crop took title prior to the taking possession thereof by a receiver appointed ex parte in a suit for foreclosure of the mortgage, without knowledge of such ex parte appointment, he was held to be entitled to an order directing the receiver to deliver the crops to him, rather than to the

623, 35 Pac. 86; *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414; *Bank of Woodland v. Christie*, 6 Cal. Unrep. 545, 62 Pac. 400; Code Civ. Proc., § 564. See, generally, **RECEIVERS**.

19. *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

20. *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006 (stating that if the mortgagee could ac-

quire any lien through a receiver, it would be a new lien, not pre-existing or created by the mortgage, but be analogous to a writ of attachment, and would be effective only after possession taken by the receiver, as the writ of attachment would be only after levy). See, generally, **MORTGAGES; RECEIVERS**.

mortgagee plaintiff in the foreclosure suit.¹ Nor is the purchaser at foreclosure sale in such case entitled to place a receiver in charge of the property during the period of redemption to oust the judgment debtor from the property, and take possession of the growing crops which have been produced through the debtor's labor.² But where a receiver is appointed, and though improperly empowered to do so, has harvested the crop, he should be allowed his expenses properly incurred therefor.³ Although a mere stipulation for a receiver in a mortgage which gives the mortgagee no interest in the growing crops, or in the rents and profits, may enlarge the rights of the mortgagee as against the mortgagor, it cannot affect the rights of others, nor authorize a court of equity to appoint a receiver in a case where the court has no such authority given by law.⁴

§ 13. Upon Sale Under Trust Deed.—A sale and conveyance under a deed of trust passes title to an unsevered fruit crop upon trees growing on the land, and where the purchaser takes possession, he is entitled to gather the fruit crop, as against a chattel mortgage executed subsequent to the deed of trust and prior to the sale. Where no severance of the crop has taken place prior to the sale, the purchaser is at least in as good a position as, and has rights equal to those of, a purchaser at foreclosure sale holding a deed and having possession after the period of redemption has expired.⁵

1. *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006.

2. *West v. Conant*, 100 Cal. 231, 34 Pac. 705.

3. *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

4. *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45 (point referred to but not decided).

5. *Penryn Fruit Co. v. Sherman-Worrell Fruit Co.*, 142 Cal. 643, 100 Am. St. Rep. 150, 76 Pac. 484 (holding that a chattel mortgage of the crop did not operate against the deed of trust as a severance or a delivery of the crop). See *supra*, §§ 8, 9.

§ 14. Between Landlord and Tenant.—As between a landlord and his tenant, the tenant is entitled to all of the annual products of the leased premises during the term,⁶ unless it is otherwise provided by the terms of the lease.⁷ And such right extends to the remnants and inferior portions of crops.⁸ It follows that where the rental is unconditional, and the crops are destroyed, the loss falls on the tenant, and he cannot claim any apportionment of the rent, nor recover back any part paid in advance.⁹ Consistently with the general principle that a tenant will not be permitted to deny the title of his landlord,¹⁰ it has been held that one who bases his right to crops raised on leased premises, on an assignment of the lessee's interest in the lease, cannot question the validity of the lease.¹¹

Where a ranch was leased for dairy purposes, the lessor to share in the products of the dairy, and the contract was made in view of the existing circumstances and conditions, nothing being said regarding the kind of crops the tenant was to plant, it was held that the question of the adaptability of the premises for particular kinds of crops was not material upon the issue whether or not the tenant had maintained a dairy of the size and productiveness contemplated by the contract.¹² And a lease which impliedly

6. *Arnold v. Producers' Fruit Co.*, 141 Cal. 738, 75 Pac. 326; *Holt Manufacturing Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597; *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666; *Stockton Savings etc. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 Pac. 800; *Hart v. Fuller*, 45 Cal. App. 618, 188 Pac. 611; *Hicks v. Butterworth*, 30 Cal. App. 562, 159 Pac. 224; *Meek v. Cunha*, 8 Cal. App. 98, 96 Pac. 107;

Adams v. Thornton, 7 Cal. Unrep. 219, 82 Pac. 215. See, generally, LANDLORD AND TENANT; Civ. Code, §§ 819, 820, 1926.

7. *Ralph v. Lockwood*, 61 Cal. 155. Also see *infra*, §§ 14, 23.

8. *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 Pac. 800; *Hart v. Fuller Co.*, 45 Cal. App. 618, 188 Pac. 611. See, also, *infra*, § 28.

9. *Meek v. Cunha*, 8 Cal. App. 98, 96 Pac. 107.

10. See LANDLORD AND TENANT.

11. *Lapique v. Plummer*, 34 Cal. App. Dec. 385, 196 Pac. 300.

12. *Converse v. Ferguson*, 166 Cal. 1, 134 Pac. 977.

contains two letting agreements, viz., one of pasture land and the other of grain land, the fact that it expressly grants the right to pasture the pasture land cannot be construed as an implied prohibition to pasture straw and stubble on the grain land.¹³

§ 15. Right of Tenant on Termination of His Estate.—

It is a rule of common law, and also by statute in California applying generally to the case of landlord and tenant, that all the rights of the tenant end absolutely with the tenancy,¹⁴ including the right to crops growing on the leased premises at the time of termination of the leasehold estate.¹⁵ An exception to this limitation is made by the common-law rule giving the tenant the right to emblements after the termination of the lease, where it cannot be known when the tenant's estate will terminate, as in the case of a tenant for life, where the estate is terminated by the act of God.¹⁶ But a leasehold estate which has been definitely cut off and terminated by foreclosure of a mortgage on the leased premises does not thereby become uncertain within the exception on the theory that it is the landlord's duty to protect the lease by a redemption from the sale, at least as against a purchaser who is a stranger to the foreclosure action.¹⁷ And a lease for a fixed term of years, with rent payable at stated times,

13. *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 Pac. 800. As to right to and disposition of crop remnants, see, also, *infra*, § 28. As to the authority of one employed as foreman to confer upon himself the rights of a tenant, see *infra*, § 23.

14. Civ. Code, §§ 819, 820. See LANDLORD AND TENANT.

15. *Agoure v. Plummer*, 175 Cal. 543, 166 Pac. 311; *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 Pac.

800; *Hart v. Fuller*, 45 Cal. App. 618, 188 Pac. 611.

16. *Sullivan v. Superior Court*, 185 Cal. 133, 195 Pac. 1061; *Hart v. Fuller Co.*, 45 Cal. App. 618, 188 Pac. 611. See *infra*, 17.

17. *Sullivan v. Superior Court*, 185 Cal. 133, 195 Pac. 1061 (the court saying that such a presumption might be indulged as against the landlord mortgagor, but it cannot be maintained as against the purchaser under the foreclosure who is a stranger to the action).

which is terminated by the act of the lessee alone in failing to pay the rent when due, does not create an estate that will entitle the lessee or his subtenant to claim the growing crops or emblements after such termination of the leasehold estate. This does not constitute a hardship upon either the lessee or subtenant for they are both amply protected by statute against forfeiture.¹⁸ Unless the tenant obtains the statutory relief, the landlord is restored to the possession of the premises with all rights to their use and occupation, which include the right to the growing crops thereon.¹⁹

§ 16. Lien of Landlord.—It is a general rule that a landlord has no lien for rent or for the value of the use and occupation of land, except by agreement.²⁰ But an unrecorded lease assuming to reserve the title to the crop in the lessor, as security for a cash rent to be paid by the lessee, without complying with the chattel mortgage law, is not effectual to create a lien for the rent, as against a chattel mortgagee of the crop without notice of the terms of the lease;¹ nor as against a mortgagee of the crop under an informal chattel mortgage, who has first obtained possession of the crop by consent of the mortgagee, and has a superior right to that of the landlord as a creditor at large of the lessee.² The same rule has been applied in the case of an oral lease, as against an attachment levied on the crop by a creditor of the tenant.³ Such an arrange-

18. Code Civ. Proc., §§ 1161, subd. 3, 1174, 1179.

19. *Agoure v. Plummer*, 175 Cal. 543, 166 Pac. 311.

20. See LANDLORD AND TENANT.

1. *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018; *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597. See note, 14 A. L. R., p. 1362, as to necessity of filing lease or contract which reserves title to crops in lessor;

and note, 9 A. L. R., p. 278, as to landlord's lien on crops for rent.

2. *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801. See LIENS.

3. *Stockton S. & L. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561. See, also, *Blum v. McHugh*, 92 Cal. 497, 28 Pac. 592, in which the question of the validity of the lessor's lien as against the attaching creditor was

ment is to be construed as an attempt to create a secret lien upon the growing crop in favor of the landlord to the injury of innocent purchasers and encumbrancers for value.⁴ Hence, a lease containing an agreement by the tenant to execute a mortgage on the crops to secure the rent is not good as against a subsequent encumbrancer without notice of the agreement, the knowledge of the existence of the lease not constituting constructive notice of such a covenant.⁵ And where the title and right of possession in the crop were to remain in the lessor until the rent should be paid, and it appeared that his assignee had in his possession more than enough of the crop delivered to him by the lessee to pay all rent due, he could claim no ownership or lien on the balance of the crop remaining on the land as against an attaching creditor of the lessee.⁶ But where one takes a mortgage on a crop from the lessee, with the knowledge that the lessor is authorized to remove and sell the crop and pay the rent out of the proceeds, the mortgage lien ceases upon the rightful removal and sale of the crop under the authority of the lease.⁷ In such case the knowledge of the lessor of the existence of the mortgage could not affect his right to remove and sell the crop, nor could constructive notice to the purchaser make the purchase a tortious act.⁸

not raised, the only question discussed being whether or not the lessor's lien had been satisfied.

4. *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801; *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018; *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597; *Stockton S. & L. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561. See CHATTEL MORTGAGES, vol. 5, p. 62 et seq.; and see LIENS.

5. *Wilkerson v. Thorp*, 128 Cal. 221, 60 Pac. 679. See NOTICE.

6. *Blum v. McHugh*, 92 Cal. 497, 28 Pac. 592.

Nor can the lessor acquire any rights in the crop as against other creditors of, or purchasers from, the lessee, by merely marking the sacks and moving them to a different place in the barn occupied by the lessee, such acts not constituting a delivery or change of possession of the property. *Lemon v. Wolff*, 121 Cal. 272, 53 Pac. 801. See *infra*, § 21.

7. Civ. Code, § 2972. See CHATTEL MORTGAGES, vol. 5, p. 91.

8. *Gates v. Tom Quong*, 3 Cal. App. 443, 85 Pac. 662. As to liens

§ 17. Life Tenant's Right as Against Remainderman.—

It is a rule of the common law that where a tenant for life sows land, he is entitled through his legal representatives to the growing crops, in case the estate determines by his death before the produce can be gathered. These profits are termed emblements, and the right to them is given on obvious principles of justice and policy, and to assure to the life tenant the compensation for his labor, and for the encouragement of husbandry, as the estate is uncertain.⁹ The right to such emblements is not confined to such crops as the tenant for life himself may sow, but applies also to such as he may have an interest in, as rental, under lease of the life estate premises.¹⁰ Likewise, the lessee of the life tenant is entitled to take the crops as against the remainderman; and the same is true where a tenancy at will is terminated by the death of the life tenant.¹¹ This is an exception to the general rule that all rights of the tenant end absolutely with his tenancy.¹² But a grantor who reserves to himself a life estate in the property granted may, by appropriate words, divest himself of the right to emblements and vest the same in his grantee, who will take as against the personal representative of the grantor.¹³

§ 18. Between Land Owner and Purchaser at Judicial Sale.—Where one holds title and the right of possession to land through a judicial sale, the time for redemption having expired, the growing crop thereon belongs to him

under agreements to farm land on shares, see *infra*, § 29.

9. *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705; *Hart v. C. H. & O. B. Fuller Co.*, 45 Cal. App. 618, 188 Pac. 611; *Blaeholder v. Guthrie*, 17 Cal. App. 297, 119 Pac. 524.

10. *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705; *Blaeholder v.*

Guthrie, 17 Cal. App. 297, 119 Pac. 524.

11. *Blaeholder v. Guthrie*, 17 Cal. App. 297, 119 Pac. 524.

12. *Hart v. C. H. & O. B. Fuller Co.*, 45 Cal. App. 618, 188 Pac. 611. See *supra*, § 14.

13. *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705. See *ESTATES; REMAINDERS*.

as part of the land.¹⁴ Similarly, a sale under execution of a leasehold estate in land, of less than two years unexpired term, carries the title to crops growing thereon at the time of the sale, such an estate not being the subject of redemption.¹⁵ A purchaser at judicial sale is not entitled, however, to possession prior to the expiration of the period for redemption, as against the judgment debtor or his successor in possession; nor is he entitled to have a receiver appointed to take possession.¹⁶ So where one of several tenants in common of land had given a lease of a portion of the land with an agreement to receive a part of the crop raised thereon for the rent, and afterward a suit for partition was commenced, and a decree entered assigning the leased portion to another of the tenants in common, it has been held that such decree does not pass to the latter the portion of the crop to be received as rent, unless the crop was unsevered at the time the decree was entered.¹⁷

§ 19. Right to Crops as Affected by Homestead.—A growing crop on premises constituting a homestead is a part of the realty, and partakes of the nature of the homestead.¹⁸ Prior to the amendment of 1911 to section 1265 of the Civil Code,¹⁹ crops harvested from lands constituting a homestead, were not, as such, exempt from execu-

14. *Corcoran v. Doll*, 35 Cal. 476. Compare *supra*, § 6.

15. Code Civ. Proc., § 700a; *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243.

16. *Mau, Saddler & Co. v. Kearney*, 143 Cal. 508, 77 Pac. 411. See generally, EXECUTIONS; JUDICIAL SALES; RECEIVERS. See note, 13 A. L. R., p. 1419, as to judicial or execution sale of realty as affecting debtor's

share in crops grown by tenant or cropper.

17. *Mahoney v. Aurrecochea*, 51 Cal. 429 (holding that the courts can take judicial notice of the time of harvest in their several counties).

18. *Dasey v. Harris*, 65 Cal. 357, 4 Pac. 204 (holding that crops do not pass under a general assignment of all property real and personal to an assignee in insolvency).

19. See Stats. 1911, p. 61.

tion,²⁰ except perhaps in cases where the general code exemption provisions might be held applicable.¹ But as the law now stands, in view of the code amendment above referred to,² no crops grown or harvested on the homestead premises are liable for the debts of the owner, except as the homestead property has been made subject by statute to execution or forced sale in satisfaction of certain judgments.³ The interests of husband and wife in the homestead being in the nature of joint tenancy,⁴ it seems their interests in and to the crops grown and gathered on the homestead premises are of the same or of a similar nature, and prevent the possession of the crops being wholly in either the husband or the wife.⁵ But where it was agreed between the husband and wife that the husband should cultivate the homestead, and in consideration therefor that all of the crops raised on the homestead should belong to him, it was held that the wife had no interest in the crops subject to the claims of her creditors.⁶ The filing of a declaration of homestead upon land, before the planting of a crop, gives no right to the crop as against a prior chattel mortgage covering the future crop of that year.⁷

III. SALE OR RESERVATION OF CROPS.

§ 20. Sale as Affected by Statute of Frauds.—After some vacillation it has become the settled doctrine that contracts

20. *Horgan v. Amick*, 62 Cal. 401; *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 755, 93 Pac. 284.

1. *Horgan v. Amick*, 62 Cal. 401 (holding grain for seed or planting purposes to the value of two hundred dollars to be exempt under Code Civ. Proc., § 690, subd. 3).

2. Civ. Code, § 1265, now provides: "... but in no case shall it [the homestead], or the products, rents, issues or profits thereof, be held lia-

ble for the debts of the owner, except as provided in this title."

3. Civ. Code, § 1241.

4. See HOMESTEADS.

5. *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335; *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 755, 93 Pac. 294.

6. *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 755, 93 Pac. 284.

7. *Hall v. Glass*, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 336.

for the sale of growing periodical crops—*fructus industriales*—are not contracts for the sale of an interest in land within the meaning of the statute of frauds, and need not be in writing in order to be valid.⁸ The application of the doctrine is not affected in California by the mere circumstance that the purchaser is to have possession of the land for the purpose of raising the crop and harvesting it when matured. In such case the purchaser is to be deemed the lessee of a term not exceeding one year, hence his interest is excepted from the operation of the statute of frauds, and being so excepted, the contract for the sale of growing crops—the product of periodical cultivation—is not affected by the statute. This would be true although the contract conferred upon the purchaser the exclusive right to the land while the crop was ripening and being harvested. The rule in its application, as indicated, is said to differ from the English rule, which requires such a contract to be in writing when it gives to the purchaser the exclusive right to the land for the purpose of growing and harvesting the crop, the English statute not exempting leases for a year or less from its operation.⁹

§ 21. Requirements of Sale Under Statute Against Fraudulent Transfers.—Growing crops are chattels not susceptible of manual delivery until harvested, and are not in the possession or under the control of the vendor within the meaning of section 3440 of the Civil Code requiring an immediate delivery and continued change of possession in order to make transfers of personal property valid as against the creditors of the vendor. A contrary construction would make it an imperative duty on the part of

8. *Vulicevich v. Skinner*, 77 Cal. 239, 19 Pac. 424; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Marshal v. Ferguson*, 23 Cal. 65 (stating that the law on this point appears to be well settled

both in the English and American courts).

9. *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340 (stating also the English rule).

the grower to abandon the possession of his farm to the vendee at the time of the sale—a proceeding the statute certainly does not contemplate.¹⁰ But a transfer by a lessee of the right to plant and raise a crop on the leased land is not a transfer of the future crop within the above code provision, where such crop does not have even a potential existence.¹¹ A similar rule was laid down in the earlier cases before the adoption of the codes, it being held that growing crops, not being susceptible of manual delivery until harvested, were not goods and chattels within the meaning of the statute of frauds.¹² But while the sale of a growing crop passes title without a delivery of possession,¹³ yet, when the crop has been harvested, it is the duty of the purchaser to take immediate possession of the crop and retain such possession.¹⁴

§ 22. Parol Reservation of Crops.—While there are some authorities in other jurisdictions holding that in the case of a sale of land an oral exception or reservation of the crop is effective,¹⁵ the weight of authority as well as the better reasoning is to the effect that where a writing is essential to the transfer of real property, such a reservation cannot be established by parol to impair the effect of the writing purporting to convey the land without reservation.¹⁶ Under this rule it has been held that a con-

10. *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *O'Brien v. Ballou*, 116 Cal. 318, 48 Pac. 130; *Globe Grain & Mill Co. v. Drenth*, 36 Cal. App. 156, 171 Pac. 821; *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 755, 93 Pac. 284; Civ. Code, § 3440.

11. *Fissel v. Monroe*, 33 Cal. App. 756, 166 Pac. 607. As to sales of future crops in general, see § 3, *supra*, and see SALES.

12. *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Bernal v.*

Hovious, 17 Cal. 541, 79 Am. Dec. 147; *Pacheco v. Hunsacker*, 14 Cal. 120; *Bours v. Webster*, 6 Cal. 661.

13. See cases cited *supra*.

14. *O'Brien v. Ballou*, 116 Cal. 318, 48 Pac. 130.

15. 8 *Ruling Case Law*, 372; Ann. Cas. 1915A, 1155, and note.

16. *Wilson v. White*, 161 Cal. 453, 119 Pac. 895; *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430. And see citation of authorities from other jurisdictions in Ann. Cas. 1915A, p. 1155, to this rule.

tract for the sale of land which contains no reservation of the crops is binding on the parties unless corrected on the ground that it was not in accordance with the agreement made.¹⁷

IV. CONTRACT TO FARM ON SHARES.

§ 23. **In General.**—Agreements to farm or cultivate land on shares vary widely in their terms as to the right of occupancy of the land, the sharing of the expenses of cultivation and harvesting, and the title to and division of the crops. The rules governing the interpretation of contracts are, generally speaking, applicable to such contracts.¹⁸ Accordingly, such agreements have been variously construed as creating between the parties the relation of master and servant;¹⁹ tenants in common of the crops;²⁰ landlord and tenant in respect to the land;¹ in some cases the relation of landlord and tenant as to the land and that of tenants in common of the crop;² and the relation of copartners.³ But a copartnership relation is seldom found to exist, owing to the almost invariable absence of one or more of the elements necessary to create that relation. There is a distinction between a cropping contract and a lease, in that a cropper has no estate in the land,⁵ the owner under a cropping contract having

17. *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430. As to the effect of conveyances containing no reservation of the crops, see *supra*, § 6.

18. *Stockton Sav. & L. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561; *Walls v. Preston*, 25 Cal. 59; *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147. See *CONTRACTS*, vol. 6, p. 1.

19. *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep.

174, 21 Pac. 955; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Wentworth v. Miller & Lux*, 53 Cal. 9; *Smyth v. Tonnison*, 24 Cal. App. 519, 141 Pac. 1059.

20. See *infra*, § 24.

1. See *infra*, § 25.

2. See *infra*, § 24.

3. *Erickson v. Rhee*, 181 Cal. 562, 185 Pac. 847.

4. *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087. See *PARTNERSHIP*.

5. *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *Rohrer v. Babcock*, 126

the right to enter and occupy the premises at any time, subject only to the rights of the cropper in respect to the crops.⁶ Thus, where the owner is in possession and in control of the land upon which the crop is planted and grown, it follows, in the absence of some transfer of his right, that he is the owner and entitled to the possession of the crop after its severance from the soil. If, under such circumstances, the cropper holds possession of the harvested crop, it is merely as the servant of the owner.⁷ A cropping contract, as such, does not include any element of a contract of employment.⁸ Hence the remedy of a cropper against the owner of the land, for breach of the contract in refusing to permit him to perform, is to recover the value of the contract at the time of the breach, which may be more or less than the value of the labor performed.⁹ It is a familiar principle that an agent cannot confer upon himself rights and privileges outside the scope of his employment.¹⁰ So where one has been employed as agent for another in renting his lands and having the oversight and care of the property, the presumption is that he cultivated the land as foreman, and the burden is upon him to show clearly an agreement that he should cultivate it as tenant for a share of the crop, otherwise

Cal. 222, 58 Pac. 537; Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74; Walls v. Preston, 25 Cal. 59; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Adams v. Thornton, 7 Cal. Unrep. 219, 82 Pac. 215. Compare supra, § 14.

6. Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800; Adams v. Thornton, 7 Cal. Unrep. 219, 82 Pac. 215.

7. Smyth v. Tension, 24 Cal. App. 519, 141 Pac. 1059 (holding the owner may replevy the crop from the cropper who has sur-

reptitiously removed it). See, also, cases cited, supra, this section.

8. Cull v. San Francisco etc. Land Co., 124 Cal. 591, 57 Pac. 456 (the court saying: "There is no element of a contract of employment in it; defendant had no direction of the time or the manner or the means of doing the work; . . . it was not defendant's crop—at least not defendant's crop solely—which was to be grown on the fallowed land").

9. Cull v. San Francisco etc. Land Co., 124 Cal. 591, 57 Pac. 456.

10. See AGENCY, vol. 1, p. 712 et seq.

the owner will be entitled to the crop.¹¹ In some instances the cropping arrangement between the parties may amount to a purchase and sale of a portion of the crop.¹²

§ 24. Farming Contract as Creating Cotenancy in the Crops.—An agreement to farm land on shares may in effect constitute the parties cotenants in the crops raised, whether such agreement be construed as a lease,¹³ or as a cropping contract,¹⁴ and such cotenancy exists while the crops are growing,¹⁵ and continues until a division is made.¹⁶ And where the undivided interest of one coten-

11. *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666.

12. *Callender v. McLeod*, 74 Cal. 376, 16 Pac. 194.

13. *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Baughman v. Reed*, 75 Cal. 319, 17 Pac. 222 (holding in an action for partition of the crop that a receiver pendente lite might be appointed); *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Sunol v. Molloy*, 63 Cal. 369; *Walls v. Preston*, 25 Cal. 59 (the court stating that there is no rule of law, so absolute in its nature, as to prevent the occupant of land, under a contract which constitutes him a tenant in common with the owner in the crops, from having as entire a control over the premises during the term, if the parties so agree, as a tenant covenanting to pay a money rent would have); *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Moosios v. Rusconi*, 37 Cal. App. 471, 174 Pac. 92 (holding where the lessor attached and took possession of the whole crop, and refused on demand to deliver the lessee's share to the

holder of a prior chattel mortgage on such share who was entitled to the possession under the terms of the mortgage, that he was guilty of conversion); *Kloster v. Hawn*, 33 Cal. App. 100, 164 Pac. 402. As to a lease in such case not being construed as constituting the parties tenants in common of the crops unless the intention is expressed, see *infra*, § 25.

14. *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537; *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404; *Knox v. Marshall*, 19 Cal. 617; *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Adams v. Thornton*, 7 Cal. Unrep. 219, 82 Pac. 215; *McDermot v. Apgar*, 1 Cal. Unrep. 149 (holding that the undivided share of the cropper could not be levied upon to satisfy a debt of the land owner).

15. *Baughman v. Reed*, 75 Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222.

16. *Courtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462; *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537; *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404; *Baughman v. Reed*, 75

ant in the crop has been mortgaged,¹⁷ or has been transferred by judicial sale,¹⁸ or by voluntary conveyance, the mortgagee or the transferee becomes, to the extent of his acquired interest, a tenant in common with the other co-sharers.¹⁹

§ 25. Farming Contract Construed as Lease.—The criterion of the relation of landlord and tenant in agreements to farm land on shares is the creating and vesting in the occupant of an estate in the land by virtue of the agreement.²⁰ The rent, by the terms of the lease, may be made payable in a share of the products of the soil equally as well as in money.¹ Although such a provision may be deemed in some instances to constitute the landlord and

Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222; *Knox v. Marshall*, 19 Cal. 617; *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147.

17. *Sunol v. Molloy*, 63 Cal. 369 (holding that where the mortgagee of the tenant took possession of the whole crop and refused delivery of the landlord's share on demand, the mortgagee was liable for conversion of the landlord's share).

18. *Schell v. Simon*, 66 Cal. 264, 5 Pac. 238.

19. *Curtner v. Lyndon*, 128 Cal. 35, 60 Pac. 462 (holding that the provisions of Civ. Code, § 3440, against fraudulent transfers, did not apply, the crop being in the possession of the sheriff under a levy of execution at the time of the transfer. See FRAUDULENT CONVEYANCES). For rights and remedies of cotenants generally, see COTENANCY, vol. 7, p. 328.

20. See LANDLORD AND TENANT. As to nature of cropping contracts, see *supra*, § 23.

1. *Harrelson v. Miller & Lux*, 182

Cal. 408, 188 Pac. 800; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243; *Arnold v. Producers' Fruit Co.*, 141 Cal. 738, 75 Pac. 326 (holding, where rent was payable by a share of the crops which had been delivered for the current year, that such provision did not constitute the tenant either the partner or the agent of the owner within section 602 of the Code of Civil Procedure so as to disqualify him as a juror in an action in which the landlord was plaintiff); *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087; *Baughman v. Reed*, 75 Cal. 319, 7 Am. St. Rep. 170; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Sunol v. Molloy*, 63 Cal. 369; *Charles v. Davis*, 59 Cal. 479; *Callahan v. Stanley*, 57 Cal. 476; *Walls v. Preston*, 25 Cal. 59; *Hicks v. Butterworth*, 30 Cal. App. 652, 159 Pac. 224; *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975.

tenant cotenants in the crops to be raised,² such cotenancy does not exist, where there are no appropriate words in the lease to indicate it;³ and in the absence of such words, the products to be delivered to the landlord after harvest will be deemed the property of the tenant until the delivery is made and treated as rent to be then paid.⁴ Accordingly, where the ownership of the crop is in the lessee, the mere fact that a portion of the harvested crop is to be delivered to the lessor as rent gives the lessor no right of action upon a harvesting contract between the lessee and a third person, the lessor in such case having no contract relation with the harvester.⁵ Similarly, where the lessor was given no interest in the crop until his share should be set apart to him, and the crop was damaged by trespassing cattle before division had been made, the lessee could maintain an action for the full amount of the damage.⁶

§ 26. Basis for Construction as Lease.—In determining whether a written instrument is a cropping agreement or a lease, the fact that the instrument is called a lease is

2. See *supra*, § 24.

3. *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Hicks v. Butterworth*, 30 Cal. App. 562, 159 Pac. 224; *Adams v. Thornton*, 7 Cal. Unrep. 219, 82 Pac. 215.

"Where one man farms land of another under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crop raised." *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647.

4. *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 Pac. 800; *Arnold v. Producers' Fruit Co.*, 141 Cal. 738, 75 Pac. 326; *Holt Mfg. Co. v.*

Thornton, 136 Cal. 232, 68 Pac. 708; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74; *Smith v. Schultz*, 89 Cal. 526, 26 Pac. 1087; *Charles v. Davis*, 59 Cal. 479; *Hicks v. Butterworth*, 30 Cal. App. 562, 159 Pac. 224; *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975.

5. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708. See, generally, **CONTRACTS**.

6. *Hicks v. Butterworth*, 30 Cal. App. 562, 159 Pac. 224 (holding that an instruction based on the ownership of the whole crop being in the tenant was not erroneous). See, generally, **PARTIES**. As to the authority of one employed as foreman to confer upon himself the rights of a tenant, see *supra*, § 23.

some evidence that it is intended to operate as such.⁷ When so designated, and taken in connection with the reservation of the right of re-entry by the owner for certain limited purposes,⁸ the keeping of the premises in repair by the tenant,⁹ the fixing of a definite term,¹⁰ and provision for delivery of the owner's share of crops off the premises, it is sufficient to justify the conclusion that the instrument was intended as a lease.¹¹ In construing an agreement to farm land on shares to be a lease, the courts have also given weight and significance to a provision therein that the owner's share of the crops should be delivered and paid "as rent";¹² and regard will be given also to the independence of the covenant relating to the occupation of the land and those covenants relating to the ownership and disposition of the crops.¹³

§ 27. Title to and Division of Crops in General.—As has been shown, an agreement to farm land on shares may constitute the parties tenants in common of the crops;¹⁴ or by its terms it may vest the absolute title either in the occupant of the land,¹⁵ or in the land owner.¹⁶ Where the

7. Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087.

8. Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800; Marshall v. Luiz, 115 Cal. 622, 47 Pac. 597; Walls v. Preston, 25 Cal. 59.

9. Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800.

10. Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800; Marshall v. Luiz, 115 Cal. 622, 47 Pac. 597; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Walls v. Preston, 25 Cal. 59.

11. Harrelson v. Miller & Lux, 182 Cal. 408, 188 Pac. 800.

12. Clarke v. Cobbe, 121 Cal. 595,

54 Pac. 74; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Walls v. Preston, 25 Cal. 59; Corey v. Struve, 16 Cal. App. 310, 116 Pac. 975.

13. Marshall v. Luiz, 115 Cal. 622, 47 Pac. 597.

14. See supra, §§ 23, 24.

15. See supra, § 25.

16. Bailey v. Sward, 184 Cal. 395, 193 Pac. 952; Farnum v. Hefner, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955; Howell v. Foster, 65 Cal. 169, 3 Pac. 647 (so construed in Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484); Wentworth v. Miller & Lux, 53 Cal. 9; Smyth v. Tennison, 24 Cal. App. 519, 141 Pac. 1059. And see supra, § 23. As

parties are cotenants the title to their respective shares vests upon the division and segregation of the harvested crops pursuant to the terms of the agreement.¹⁷ So, where a crop was readily divisible by weight or measurement into portions absolutely alike in quality and value, and an equal division was in fact made by the cropping tenant, placed in separate piles, each pile having a separate letter, and the lessor's share was tendered to him and refused, and the lessor subsequently took possession of the whole crop, it was held that the lessee could recover his share in an action of replevin.¹⁸ And where the segregation of the crop was made by the cropper as the harvesting progressed, it was held that the cropper's share, to the extent segregated, was subject to the claims of his creditors.¹⁹ Also, where such an agreement vested the title to the crop in the lessor, and provided that upon delivery of the crop to him the lessee's share should immediately be redelivered to the lessee, it was held that upon a valid tender of the crop to the lessor which was refused, the purchaser of the lessee's interest had a clear right to retain such share without a delivery thereof in the first instance to the lessor.²⁰ It has been held that an agree-

to limited title in or lien on crops, see *infra*, § 29, and compare *supra*, § 16.

17. *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537; *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404; *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955; *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713.

18. *Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713.

19. *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404. See *Millet v. Taylor*, 26 Cal. App. 161, 146 Pac. 42, holding parol evidence of intention admissible in construing the word "proceeds" in a lease pro-

viding for a division of the proceeds of the land, as to whether net or gross proceeds was meant.

20. *Farnum v. Hefner*, 79 Cal. 575, 21 Pac. 955.

Similarly, where a crop of hay was divided and the respective shares were stacked in separate yards, one of which was selected by the owner at the request of the cropper, the title to the share selected thereupon vested in the owner; and if there was no agreement reserving or giving to the cropper a lien upon or interest in the hay so selected, he can claim no interest therein or lien thereon for any payment claimed to be due under

ment "to plow and put in wheat" certain land, "in good farmer-like style," whether construed as a lease or cropping contract, does not entitle the occupant to a volunteer crop of wheat growing on a part not sown by him.¹

§ 28. Right to and Disposition of Crop Remnants.—In consonance with the general rule governing the title to crops raised by a tenant, the tenant is entitled to the remnants and inferior portions of the crops grown by him, such as beet-tops and straw and stubble, unless the agreement, or the rules and usages of good husbandry prevailing in the vicinity, require them to be left on the leased premises.² Thus, where a lease of land for sugar beet farming provided that the land was to be farmed in accordance with the custom of the sugar company, and it was customary to leave the beet-tops on the land for fertilization, it was held that the lessees had thereby agreed to leave the beet-tops for that purpose. The word "farming" includes the cultivation and fertilization of the soil as well as the caring for and harvesting the crops. While in a general sense a "crop" of beets includes the "tops" as severed from the soil, an agreement that the whole crop is to be topped before delivery shows it was not the intention of the parties to divide the tops or to include the tops as part of the crop.³ The term "stubble," as used in a cropping lease vesting in the lessor the right to the stubble left on the land, has been construed as including grain remaining uncut after the period of harvest.⁴

the lease. *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537.

1. *Shaw v. Mayer*, 95 Cal. 301, 30 Pac. 541.

2. *Harrelson v. Miller & Lux*, 182 Cal. 408, 188 Pac. 800; *Callahan v. Stanley*, 57 Cal. 476; *Hart v. C. H. & O. B. Fuller Co.*, 45 Cal. App. 618, 188 Pac. 611; *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975. See *supra*, § 13.

3. *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975, per Burnett, J.

4. *Callahan v. Stanley*, 57 Cal. 476 (holding parol evidence admissible to show the meaning of "stubble" by common usage). For construction of covenant in a lease relating to pasturage of straw and stubble, see *supra*, § 14.

§ 29. Agreement for Lien or Limited Title to Crops.—

While ordinarily neither party to an agreement to farm land on shares has a lien on the share of the other in the absence of a stipulation to that effect,⁵ the parties may agree that the right of possession or title to the crop shall vest in the owner of the land as security for money advanced, or until certain conditions have been performed by the occupant, and such agreement is good as between them.⁶ But the rule against the creation of secret liens to the injury of innocent third parties is applied in these cases, as well as in those where a lessee gives a lien on the crops to his lessor to secure the payment of a money rent.⁷ Yet where a lease in the nature of a cropping contract provided that title to the crop should remain in the lessor until division should be made, and that certain advances to be made by the lessee to the lessor should be refunded in gold coin or out of the lessor's share of the crop on the basis of the prevailing market price, it was held that the refunding agreement, being a promise to pay and not a pledge, created no lien on the lessor's share as against a subsequent chattel mortgage of the crop executed by the lessor, and it was immaterial whether or not the

5. *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537. See *supra*, § 16.

6. *Tuohy v. Linder*, 144 Cal. 790, 78 Pac. 233; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243; *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404; *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955; *Wallace v. Maples*, 72 Cal. 356, 14 Pac. 19; *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647; *Ralph v. Lockwood*, 61 Cal. 155; *Wentworth v. Miller & Lux*, 53 Cal. 9; *Smyth v. Tennison*, 24 Cal. App. 519, 141 Pac. 1059; *Rosenberg Bros. & Co. v. Ross*, 6 Cal. App. 755, 93 Pac. 284.

7. *Summerville v. Stockton Mill-*

ing Co., 142 Cal. 529, 76 Pac. 243 (principle referred to but not decided); *Crocker v. Cunningham*, 122 Cal. 547, 55 Pac. 404. See *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647, in which such a lien is apparently held good as against an attaching creditor of the lessee, but is distinguished in *Stockton Savings etc. Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561, on the ground that the possession of the crop by the lessee was in effect that of a servant of the lessor; and see, also, *Wentworth v. Miller & Lux*, 53 Cal. 9, which is distinguishable on the same ground. See *supra*, § 16, and see *LIENS*.

mortgagee had constructive notice of the refunding agreement.⁸ In applying the rule there is no distinction to be made between oral and written contracts.⁹ But where tenants have abandoned a growing crop, the landlord may take possession and harvest it and is entitled to a lien thereon for moneys expended, as against the creditors of the tenant,¹⁰ or as against prior encumbrancers.¹¹

V. ACTIONS.

§ 30. **In General.**—The remedy of a lessor for the breach of a contract by a lessee not to sell or remove the crops is to be sought by a re-entry or by an action for damages, and not by injunction against a third person whose claims upon the crop were acquired in ignorance of the pretensions of the lessor.¹² The remedy of a cropper against the land owner who does not comply with his agreement is an action for breach of contract.¹³ In an action by a harvester against the lessee of land, upon a contract to harvest grain, it has been held that the lessee may counterclaim all damages for plaintiff's delay in performing the contract, whether accruing to him or to the owner of the land to whom an undivided third of the crop was payable as rental. In such case the defendant is not limited on his counterclaim to his own proportion of the damages.¹⁴ One who has the title to a growing crop may enjoin an-

8. *Bailey v. Sward*, 184 Cal. 395, 193 Pac. 952.

9. *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. 1018.

10. *Charles v. Davis*, 59 Cal. 479.

11. *Tuohy v. Linder*, 144 Cal. 790, 78 Pac. 233. See, generally, **LIENS**. As to lien of landlord on crops, see *supra*, § 16.

12. *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. 597.

13. *Smyth v. Tennison*, 24 Cal. App. 519, 141 Pac. 1059; *Cull v. San Francisco etc. Land Co.*, 124 Cal. 591, 57 Pac. 456. See *supra*, § 23.

14. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708. See *supra*, § 24; and see, generally, **SETOFF AND COUNTERCLAIM**.

other who is insolvent from harvesting and removing it.¹⁵ In such case it is sufficient to show the inability of the defendant to respond in damages, and absolute and complete insolvency need not be shown.¹⁶ In an action brought to eject the occupant of land on which there is a growing crop, a receiver can properly be appointed to take possession, harvest and preserve the crop pending the action.¹⁷ Where an injury to growing and prospective crops results from the wrongful obstruction of a natural waterway and the overflow of water on the land, and the obstruction is permanent in its nature and amounts to a continuing nuisance, the owner of the land is entitled to maintain an action for its abatement.¹⁸

§ 31. Damages Recoverable.—Damages may be recovered for the loss or destruction of matured but unsevered crops.¹⁹ And it has often been decided that damages are recoverable for the destruction or loss of merely immature growing crops, although there was no absolute certainty that they would ever mature.²⁰ Dam-

15. *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666; *West v. Smith*, 52 Cal. 322.

16. *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666. See, generally, **INJUNCTIONS**.

17. *Corcoran v. Doll*, 35 Cal. 476. As to authority of receiver to take possession of crops upon mortgage foreclosure, see *supra*, § 12; and as to the right of the successful plaintiff in ejectment to crops, see *supra*, § 8. See, generally, **EJECTMENT; RECEIVERS**.

18. *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646. See, generally, **NUISANCE**.

19. *Quint v. Dimond*, 147 Cal. 707, 82 Pac. 310; *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708. See note, 8 A. L. R., p. 605,

as to tenant's right to recover damages from third person for injury to crops or grass.

20. *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 290; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Shoemaker v. Acker*, 116 Cal. 239, 43 Pac. 62 (principle recognized but not decided); *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 4 Pac. 381; *Ellis v. Tone*, 58 Cal. 289; *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646; *Chambers v. Belmore Land etc. Co.*, 33 Cal. App. 78, 164 Pac. 404; *Fay v. Cox*, 45 Cal. App. 696, 188 Pac. 623; *Telander v. Tujunga Water etc. Co.*, 43 Cal. App. 492, 185 Pac. 504; *Barr v. Branstetter*, 42 Cal. App. 725, 184 Pac. 409; *McGillivray*

ages have also been recovered for the loss of prospective crops where the land was not even seeded or planted.¹

§ 32. Measure of Damages.—The true measure of damage for the total destruction of a growing or standing crop is the value of the crop in the condition it was at the time and place of destruction.² Such rule is in effect a specific application of the general measure of damages laid down by section 3333 of the Civil Code.³ While no rule of measure of damage to a growing crop injured but not totally destroyed has been expressly approved in California, the correct measure of damage in such case would seem to be the difference between the value of the crop before and after the injury.⁴ As to whether or not interest computed on the value of a destroyed crop is a proper part of the damage has been referred to but not decided.⁵

v. Hampton, 39 Cal. App. 726, 179 Pac. 733; Allen v. Los Molinos Land Co., 25 Cal. App. 206, 143 Pac. 253; Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. 425; Wendt v. Smith, 33 Cal. App. Dec. 703, 94 Pac. 736.

1. Fresno Canal & Irr. Co. v. Perrin, 170 Cal. 411, 149 Pac. 805; Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366; Crow v. San Joaquin etc. Irr. Co., 130 Cal. 309, 62 Pac. 562; Rice v. Whitmore, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501; Parkinson v. Langdon, 36 Cal. App. 80, 171 Pac. 710. See, also, DAMAGES, post, p. 766, § 31 et seq.

2. Fay v. Cox, 45 Cal. App. 696, 188 Pac. 623; Teller v. Bay & River Dredging Co., 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 276 (Beatty, C. J., dissenting on the ground that "as to the rule of damages the decision seems to be in conflict with the decision in Crow v. San Joaquin etc. Irr. Co.,

130 Cal. 309, 62 Pac. 562"); Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62; Harrison v. Spring Valley H. G. Co., 65 Cal. 376, 4 Pac. 381; Fay v. Cox, 45 Cal. App. 696, 188 Pac. 623; Strecker v. Gaul, 35 Cal. App. 619, 170 Pac. 646; Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58, 91 Pac. 425. See DAMAGES, post, p. 778, § 40, as to loss of profits from growing crops; and same article, § 76, as to damages for injuries to growing crops.

3. Strecker v. Gaul, 35 Cal. App. 619, 170 Pac. 646; Barr v. Branstetter, 42 Cal. App. 725, 184 Pac. 409; Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58, 91 Pac. 425 (referred to in Barr v. Branstetter, 42 Cal. App. 725, 184 Pac. 409, as having applied the code measure of damages). See DAMAGES.

4. Harrison v. Spring Valley H. G. Co., 65 Cal. 376, 4 Pac. 381.

5. Teller v. Bay & River Dredg-

From failure of water and acts preventing cultivation. The measure of damage for loss of crops due to breach of contract for furnishing water for irrigation,⁶ or to the wrongful diversion of water from land,⁷ is the probable yield and market value of the crop, less the cost of producing and marketing it. The same measure of damage has been applied in the case of a loss of crops resulting to a lessee from a breach of a covenant in the lease to be let into possession;⁸ and from being ousted from the leased premises before the harvest of the crops;⁹ and to the loss resulting to a lessor due to the failure of the lessee to plant crops in which the lessor was entitled to share.¹⁰ Such measure of damage resulting from a breach of an obligation arising out of contract is in effect the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, as provided in section 3300 of the Civil Code.¹¹ But the rule is not applicable where there has been a total failure to supply water under contract. In such case the proper measure of damages is the difference between the rental value of the land with the water, and its rental value without it, deducting from the difference the lawful price of

ing Co., 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 4 Pac. 381. See Civ. Code, § 3287. See DAMAGES, post, p. 789, § 48 et seq.

6. *Telander v. Tujung W. & P. Co.*, 43 Cal. App. 492, 185 Pac. 504; *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253.

7. *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 290; *Ellis v. Tone*, 58 Cal. 289 (holding the court was not bound to instruct the jury of its own motion as to the measure of damages).

8. *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

9. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736.

10. *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710. For instructions based upon the rule, see *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501, and *Ellis v. Tone*, 58 Cal. 289.

11. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710; *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253. See DAMAGES.

the water.¹² Thus it has been held that where certain quantities of water were furnished to the land each year, but certain parts of the land were without water for the entire year, it was proper for the jury to find from the conflicting evidence what portions of the land were left without water for the entire year and to apply the measure of damages above stated to the acreage thus found, although it would be improper to apply that measure of damages to land which had been partially supplied with water during the year.¹³ Some of the decisions, however, have said that the application of the rule of comparative values of land with and without water, on the ground that a loss of profits which the owner might have realized from an unplanted crop which he would have planted if he had had the water, is too remote and speculative to be allowed as damage.¹⁴

§ 33. Method of Determining Value of Destroyed or Lost Crops.—In determining the value of a growing crop the proper criterion to follow is to determine the probable yield and market value and deduct therefrom the cost of producing and marketing the same.¹⁵ In applying this

12. *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411, 149 Pac. 805; *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366; *Crow v. San Joaquin etc. Irr. Co.*, 130 Cal. 309, 62 Pac. 562, 1058.

13. *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 412, 149 Pac. 805.

14. *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366; *Crow v. San Joaquin etc. Irr. Co.*, 130 Cal. 309, 62 Pac. 562, 1058. Compare *Parkinson v. Langdon*, 33 Cal. App. 80, 171 Pac. 710, and *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501, cited in note to *supra*, § 30, where damages were allowed based on the value of crops

which might have been planted and grown.

15. *Teller v. Bay & River Dredging etc. Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501; *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 4 Pac. 381; *Ellis v. Tone*, 58 Cal. 289; *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736; *Fay v. Cox*, 45 Cal. App. 696, 188 Pac. 623; *Telander v. Tujunga, Water & P. Co.*, 43 Cal. App. 492, 185 Pac. 504; *Barr v. Branstetter*, 42 Cal. App. 725, 184 Pac. 409; *Catlett v. Ben-*

criterion the courts have adopted and repeatedly approved the rule or proposition that "in cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood cultivated in like manner, the stage of growth of the crops at the time of injury or destruction, the expense of cultivating, harvesting and marketing the crops, and the market value at the time of maturity or within a reasonable time after the injury or destruction of the crops."¹⁶ The jury may also with the aid of testimony consider all of the circumstances existing at any time before the trial, favoring or rendering doubtful the conclusion that the crop would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed growth or increase.¹⁷ But while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction.¹⁸ In other words, it is proper to consider the market value of the crops at the time or about the time of their injury or destruction, but this is for the purpose of determining

nett, 37 Cal. App. 91, 173 Pac. 598; Parkinson v. Langdon, 36 Cal. App. 80, 171 Pac. 710; Strecker v. Gaul, 35 Cal. App. 619, 170 Pac. 646; Allen v. Los Molinos Land Co., 25 Cal. App. 206, 143 Pac. 253; Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58, 91 Pac. 425.

16. Teller v. Bay etc. Dredging Co., 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; Fay v. Cox, 45 Cal. App. 696, 188 Pac. 623; Strecker v. Gaul, 35

Cal. App. 619, 170 Pac. 646; Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58, 91 Pac. 425 (holding that an objection to evidence of a similar crop grown on the land several years before, on the ground of remoteness, goes to its weight and not to its admissibility). For instructions based on the rule, see Fay v. Cox and Teller v. Bay & River Dredging etc. Co., *supra*.

17. Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

18. See *supra*, § 32.

the value at the time of the destruction.¹⁹ The introduction of evidence, such as indicated in the above rule as the means of arriving at value, is also approved, or recognized as containing the true element of determining damage, in cases generally involving the loss of crops.²⁰

As to rent with cost of production being an element of value.—As one method of computing the value of destroyed crops, it has been proposed to take the rental value of the land, with the cost of producing the crops up to the time of their destruction. But this method has been condemned as a determination of cost and not of value. Such crops are of value to the owner, not as growing vegetation upon his land, but because in the course of nature they will come to fruition, and so have a market value, and thus will bring to him profit for his disbursement and expenses in their care and maintenance.¹

§ 34. Materiality of Cost of Production and Burden of Proof.—In an action for damages for loss of crops, where the measure of damage is the difference between the probable market value and cost of production, it seems that some evidence of cost is necessary for a recovery. Thus, in an action brought by a tenant on shares for ouster, where the measure of damage was the value of the tenant's share less the cost of producing the whole crop, the plaintiff cannot recover without proof of the probable cost of producing and marketing the crops.² But in an action

19. *Fay v. Cox*, 45 Cal. App. 696, 188 Pac. 623.

20. *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 290; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Ellis v. Tone*, 58 Cal. 289 (holding it proper for a witness to testify what in his opinion the land would have produced if water could have been procured to irrigate it); *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736; *Parkinson v. Langdon*, 36

Cal. App. 80, 171 Pac. 710; *Telander v. Tujunga Water & P. Co.*, 43 Cal. App. 492, 185 Pac. 504; *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253.

1. *Teller v. Bay and River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942.

2. *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736.

for diversion of water from land and consequent injury to plaintiff's crop, it has been held that an instruction that it was incumbent on the plaintiff to prove affirmatively the cost of producing and harvesting, and what would have been the probable increase of the crop by irrigation, was too broad a statement of the rule,—it being stated that if the jury could have found the necessary deductions by inference from the facts in evidence, whether affirmatively shown by the plaintiff or in any other way, they might have done so.³ And it has been held in an action for damages for a breach of contract to supply water for irrigation, that, assuming some expense would have been incurred in producing and harvesting the crop, it was defendant's duty to have produced, either independently or upon cross-examination, evidence bearing thereon, and that in the absence of any further showing, the court was justified in accepting the evidence of the value of the harvested crop as tending to establish the amount of damage sustained.⁴

§ 35. Duty to Minimize Damage.—One threatened with injury through breach of an obligation is required to do what he can with reasonable diligence and slight expense to prevent loss.⁵ Thus, where a fruit crop was injured by the wrongful withholding of water because of delinquent assessments, and the owner could have prevented the injury by procuring other water at small expense or by paying the assessments, his damage is limited to the cost of such water which did not exceed the amount of the assessments.⁶ Likewise, where the purchaser of a growing crop of fruit was required to tie up the limbs of the trees to prevent breakage, which he omitted to do, an instruction purporting to state the owner's duty to act in

3. *Ellis v. Tone*, 58 Cal. 289.

5. See DAMAGES, post, p. 782.

4. *Telander v. Tujunga Water & P. Co.*, 43 Cal. App. 492, 185 Pac. 504.

6. *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

that respect which omitted the element of reasonableness, was held erroneous.⁷ But in a case where a lessor failed to construct headgates as provided in the lease to enable the lessee to irrigate the land demised, and the expense necessary to avoid or mitigate the injury to the crops required the construction of such headgates at a cost of upward of two thousand dollars, it was held that full recovery of damages could not be denied.⁸

§ 36. Damage from Breach of Contract to Farm on Shares.—The general measure of damages for the destruction or loss of crops has already been indicated;⁹ and the general principles involved are applicable to cases where such crops are being cultivated on shares.¹⁰ Thus, in determining the value of a destroyed crop in a suit brought by a lessee of land on shares, the proper criterion to follow is to determine the probable yield and market value of the crop and deduct therefrom the cost of producing and marketing the same and the value of the share of the landlord.¹¹ Likewise, where a tenant under a lease giving him a share of the crops is ousted from the premises before harvest, the measure of his damage is the value of the share of the crop which he would have received, less the amount he would have expended under the contract in order to produce the whole crop.¹² But such lessee cannot recover both the value of his share, less the cost of producing it, and the value of his services performed on

7. *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 Pac. 843.

8. *Chambers v. Belmore Land etc. Co.*, 33 Cal. App. 78, 164 Pac. 404.

9. See *supra*, §§ 32, 33.

10. *Teller v. Bay and River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 69 Pac. 708; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Rice v. Whitmore*, 74

Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501; *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736; *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710.

11. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736.

12. *Wendt v. Smith*, 33 Cal. App. Dec. 703, 194 Pac. 736.

the land before being ousted.¹³ Nor is a lessor who ousted his tenant entitled to be credited against the lessee's claim of damage with the amount earned by the lessee on other work after his ouster.¹⁴ As has been pointed out, the benefit of the rule allowing damages cannot inure to one who could have avoided such damages by complying with his contract.¹⁵

13. *Rice v. Whitmore*, 74 Cal. 619,
5 Am. St. Rep. 479, 16 Pac. 501;
Wendt v. Smith, 33 Cal. App. Dec.
703, 194 Pac. 736.

14. *Wendt v. Smith*, 33 Cal. App.
Dec. 703, 194 Pac. 736.

15. *Holt Mfg. Co. v. Thornton*,
136 Cal. 232, 69 Pac. 708. See
supra, § 35.

(H. L. D.)

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See PLEADING.

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I. INTRODUCTORY.

§ 1. **Definition.**—The term “damages” describes the monetary recovery which courts assess for a legal wrong of a private character. Primarily, it involves the idea of compensation. Thus the Civil Code of California declares:

“As a general rule, compensation is a relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance.”¹

1. Civ. Code, § 3274, in part.

"Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."²

"Detriment is a loss or harm suffered in person or property."³

Although the thought of compensation is fundamental in the conception of damages, the term includes nominal damages,⁴ exemplary or vindictive,⁵ and double or treble, damages.⁶ In the broad sense in which the word is used in section 3281 of the Civil Code, above quoted, it has been said that the amount of money recovered in any judgment may properly be called damages.⁷ On the other hand, the phrase "exemplary damages" has been criticised because the idea of compensation is absent from it.

"As applied to the defendant, the phrase 'exemplary damages' is appropriate enough; but as to the injured party it could not be said that he could sustain 'exemplary damages.' It would, obviously, be absurd so to say. He could, manifestly, sustain such damages only as amounted to an actual loss to him."⁸

§ 2. Distinctions.—Damages are to be distinguished from fines, which are the monetary punishment assessed by the courts for public wrongs,⁹ and from penalties, in which, though the recovery is for a private wrong, the amount is arbitrarily fixed by statute,¹⁰ or by contract of

2. Civ. Code, § 3281.

3. Civ. Code, § 3282.

4. *Maier v. Wilson*, 139 Cal. 514, 73 Pac. 418. See *infra*, § 5 et seq., as to nominal damages.

5. *Maier v. Wilson*, 139 Cal. 514, 73 Pac. 418; *Hoban v. Ryan*, 130 Cal. 96, 62 Pac. 296. See *infra*, § 106 et seq., as to exemplary damages.

6. *Hoban v. Ryan*, 130 Cal. 96, 62 Pac. 296.

7. *Keyes v. Moy Jin Mun*, 136 Cal. 129, 68 Pac. 476.

8. *Sally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325 (per Hall, J.). See for other definitions of the term "damages": *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706; *Hoban v. Ryan*, 130 Cal. 96, 62 Pac. 296; *Wainscott v. Occidental Bldg. etc., Assn.*, 98 Cal. 253, 33 Pac. 88.

9. See CRIMINAL LAW, *ante*, §§ 482 et seq., p. 618; and FINES.

10. See PENALTIES.

the parties.¹¹ A distinction is also to be noted between the word "damage," employed in the singular, and "damages." "Damage" is defined to be the loss, injury or deterioration, caused by the negligence, design or accident of one person to another in respect to the latter's person or property, whereas "damages" signifies a compensation in money for a loss or damage.¹² So regarded, "damage" is the occasion of "damages." But the term "injury" is susceptible of a double meaning, as indicating either the wrongful act or its consequences, and when used in the former sense there is an obvious distinction between "injury" and "damage."¹³ These distinctions are not without value, for it often conduces to a clear understanding of the subject to discriminate between the wrongful act, the detriment it causes, and the compensation which the law endeavors to give.

§ 3. Scope of Article.—This article deals with the general principles of damages as indicated by the analysis above. Supplementing such general principles and the matters relating to certain special statutory provisions considered in the course of this discussion,¹⁴ reference is made to other articles in this work for the rules pertaining to the elements and measure of damages for particular wrongs;¹⁵ for the breaches of particular con-

11. See *infra*, §§ 94-105, as to liquidated damages and penalties.

12. *Wainscott v. Occidental Bldg. etc. Assn.*, 98 Cal. 253, 33 Pac. 88.

The word "damage" means injury. *Ellis v. Central California Trac. Co.*, 37 Cal. App. 390, 174 Pac. 407.

13. *Felsenthal v. Warring*, 40 Cal. App. 119, 180 Pac. 67. See as to damages without wrong and wrong without damage, *ACTIONS*, vol. 1, pp. 329, 330.

14. See *infra*, § 71, as to special statutes fixing measure of damages

for particular torts; *infra*, § 77, as to statutes fixing measure of damages for breach of particular contracts; and *infra*, § 106, as to statutes fixing double and treble damages in particular cases.

15. *ARREST*, vol. 3, p. 157 (liability in damages for causing wrongful arrest); *ASSAULT AND BATTERY*, vol. 3, p. 190 et seq.; *ATTACHMENT*, vol. 3, p. 555 et seq. (damages for wrongful attachment); *CONFUSION OF GOODS*, vol. 5, p. 488 et seq.; *CONSPIRACY (civil)*, vol. 5, p. 528 et seq.; *FALSE IMPRISONMENT*; IN-

tracts;¹⁶ or for negligence in the supervision,¹⁷ maintenance or operation of property;¹⁸ or for damages in particular or special proceedings;¹⁹ or for effecting a frivolous appeal;²⁰ or for effecting an appeal for mere delay;¹ or such as pertain to the malperformance or nonperformance of certain obligations of a public or quasi-public nature.² Other articles also are devoted to discussions of

TERFERENCE (as to damages for interference with contract relations or trade or business); LIBEL AND SLANDER; MALICIOUS PROSECUTION; MONOPOLIES AND COMBINATIONS; NUISANCE; SEDUCTION; TRESPASS; TROVER AND CONVERSION; WASTE; and other specific articles.

16. See AUTOMOBILES, vol. 3, p. 799 et seq. (as to various contracts); BAILMENTS, vol. 4, p. 16 et seq. (as to damages for breach of contract of bailment); BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 460 (as to damages in general); p. 461 (as to exemplary damages); CARRIERS, vol. 4, p. 868 et seq.; CHATTEL MORTGAGES, vol. 5, p. 116 (as to damages for conversion of mortgaged property); CIVIL RIGHTS, vol. 5, p. 132 (as to damages under § 54, Civ. Code, for violation of civil rights); CONSPIRACY (civil), vol. 5, p. 528; CONTRACTS, vol. 6, p. 450 et seq. (as to damages for breach generally); COVENANTS, vol. 7, p. 774; MASTER AND SERVANT (as to contracts of employment or service); INNKEEPERS; LANDLORD AND TENANT (as to leases); TELEGRAPHS AND TELEPHONES (as to telegrams and messages); VENDOR AND PURCHASER; and other specific articles relating to contracts.

17. See ANIMALS, vol. 2, p. 47 et seq. (damages by trespassing); EXPLOSIONS AND EXPLOSIVES; FENCES; FIRES.

18. See AUTOMOBILES, vol. 3, p. 835

et seq. (negligence in operation); CANALS; CARRIERS, vol. 4, p. 892 et seq. (negligence in carriage of property); pp. 928, 941 (damages for wrongs or negligence in carriage of passengers); ELEVATORS (negligence in operation); FERRIES; NEGLIGENCE; RAILROADS; SLEEPING-CAR COMPANIES; STREET RAILWAYS; TURNPIKES AND TOLL-ROADS; WAREHOUSES; WHARVES.

19. See CLAIM AND DELIVERY, vol. 5, p. 206 (damages for taking and holding of personal property generally), and p. 209 et seq. (special and exemplary damages); EMINENT DOMAIN (and as relating to damages arising from appropriation by the state, see Code Civ. Proc., §§ 1248-1254, and Pol. Code, §§ 2688-2690; 2694); FORCIBLE ENTRY AND DETAINER; INJUNCTION (and see Code Civ. Proc., § 529); MANDAMUS (and Code Civ. Proc., §§ 1090, 1095); NUISANCES (and Code Civ. Proc., § 731); SPECIFIC PERFORMANCE.

20. See APPEAL AND ERROR, vol. 2, p. 977 (and see Code Civ. Proc., § 980); COSTS, vol. 7, p. 318.

1. COSTS, vol. 7, p. 318.

2. See ATTORNEYS AT LAW, vol. 3, p. 671 et seq. (damages for negligence); CLERKS OF COURT, vol. 5, p. 234 (liability in damages for malfeasance in office); HOSPITALS AND ASYLUMS (and see Pol. Code, § 2165a); SHERIFFS AND CONSTABLES; PHYSICIANS AND SURGEONS (damages for malpractice). For damages against

such matters as damages for wrongful death;³ indemnity against damages;⁴ damages by mobs;⁵ damages recoverable under employers' liability acts;⁶ for refusal to acknowledge satisfaction of mortgage;⁷ or for the protesting or dishonor of negotiable paper.⁸ Matters pertaining to the question as to whether a cause of action for damages exists at all are outside the purview of this article, as are also principles relating to the right of the particular plaintiff to sue, the extent of his right to recover as affected by his special property interests, and the joinder of causes of action.⁹

§ 4. Survey of California Law.—The law of California on the subject of damages presents no strikingly unique feature beyond the fact of its codification. Part I of Division Fourth of the Civil Code relates to the subject of relief.¹⁰ Of this part of the code it has been said that it was intended as a comprehensive statement of the entire law upon the subject. The theory and plan of the codes required that they should constitute such a comprehensive statement of general principles. The rules laid down must, therefore, have universal application, unless a contrary intent is indicated. They cover the whole subject, and they are not rules of procedure. They define and regulate rights.¹¹ But though this division of the Civil Code is given this comprehensive aspect, there are numerous other statutory provisions elsewhere in the codes and general laws which concern the subject of damages, all of which are noticed or referred to in the course of this article. Prior to the adoption of the code, the law of damages was enunciated by the courts, substantially in accordance with

municipalities for the negligent maintenance of streets, see HIGHWAYS; and for damages recoverable against certain corporation officials, see CORPORATIONS, vol. 7, p. 10.

3. See DEATH.

4. See INDEMNITY.

5. See MUNICIPAL CORPORATIONS.

6. See MASTER AND SERVANT; WORKMEN'S COMPENSATION.

7. See MORTGAGES.

8. See NEGOTIABLE INSTRUMENTS.

9. See ACTIONS, vol. 1, p. 345 et seq.

10. Civ. Code, §§ 3274-3423.

11. Spreckels v. Hawaiian Com. etc. Co., 117 Cal. 377, 49 Pac. 353.

the established principles of the common law which were subsequently embodied in code form. The definitions of "damages" and "detriment" in sections 3281 and 3282 of the Civil Code, respectively, are said to have been formulated in view of the old rule of the common law, *damnum absque injuria*; the rules for the ascertainment of damages both in their compensatory and punitive phases are founded on the traditions of English jurisprudence; and, in general, the law of California, in this connection, may be regarded as a faithful reflection of the common law.¹²

II. NOMINAL DAMAGES.

§ 5. Definition.—Nominal damages, a trifling sum, are awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained, or where from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show.¹³ The trifling sum to be awarded as nominal damages may be a penny, a cent, or a few cents.¹⁴ One dollar is said to be the amount usually adjudged where only nominal damages are allowed. But one hundred dollars has been held to be a substantial recovery and does not come within the definition of nominal damages.¹⁵

§ 6. Right of Recovery in General.—The right to recover nominal damages is thus declared by the Civil Code:

"When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."¹⁶

12. *Wolff v. City of Los Angeles*, 33 Cal. App. Dec. 254, 60 Cal. Dec. 626, 193 Pac. 862.

13. *Maher v. Wilson*, 139 Cal. 514, 73 Pac. 418.

14. *Maher v. Wilson*, 139 Cal. 514, 73 Pac. 418; *Davidson v. Devine*,

70 Cal. 519, 11 Pac. 664; *Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295.

15. *Broads v. Mead and Cook*, 159 Cal. 765, Ann. Cas. 1912C, 1125, 116 Pac. 46.

16. Civ. Code, § 3360.

It is not necessary to show some actual damage in order to recover nominal damages. A violation of right gives in itself the right to recover nominal damages, such damages being presumed by law to flow from the wrong itself.¹⁷ Hence a claim for nominal damages will sustain an action.¹⁸ In this connection it should be noted that the failure to prove actual damage has the same legal effect as if no damage had in fact been sustained, the result being the recovery of nominal damages only.¹⁹ A finding of nominal damages determines the issues in favor of the plaintiff, such as those of negligence and contributory negligence.²⁰ But a judgment will not be reversed merely to allow the recovery of nominal damages, unless costs, or some question of permanent right is involved.¹

§ 7. For Breach of Contract.—The failure to perform a duty required by contract is a legal wrong independently of actual damage sustained by the party to whom performance is due, and, in general, where a contract right is violated, the maxim “*de minimis non curat lex*” has no application, and nominal damages will be given.² Such damages are presumed to follow as a conclusion of law from proof of the breach.³ Thus, where one agrees to buy

17. *Pleasants v. North Beach & M. R. R. Co.*, 34 Cal. 586.

18. *McCarty v. Beach*, 10 Cal. 461; *Crane v. Heine*, 35 Cal. App. 466, 170 Pac. 433; *Harron, Rickard & McCone v. Wilson-Lyon & Co.*, 4 Cal. App. 488, 88 Pac. 512; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380. See *infra*, § 123, as to sufficiency of complaint showing right to nominal damages as against a general demurrer.

19. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; *Gregory v. Spieker*, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576; *Benjamin v.*

Stewart, 61 Cal. 605; *Weichers v. Dehail*, 41 Cal. App. 547, 183 Pac. 187; *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322.

20. *Donnatin v. Union Hardware & Metal Co.*, 38 Cal. App. 8, 175 Pac. 26, 177 Pac. 845.

1. See *APPEAL AND ERROR*, vol. 1, p. 1009, and cases there cited.

2. *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75. But see *infra*, § 9, for instances where the doctrine *de minimis* was invoked to preclude recovery of even nominal damages. See *ACTIONS*, vol. 1, p. 332.

3. *Browner v. Davis*, 15 Cal. 9.

land at tax sale and hold it in trust for the owner, but violates the agreement by assigning the certificate of sale to a third person, the owner, though he has sustained no actual damage, is entitled to recover nominal damages.⁴ And a breach of warranty in the sale of an article entitles the buyer to nominal damages at least.⁵ Such damages are allowable also for the violation of an easement for light, and an adverse judgment because the injured party has sustained no actual damage is erroneous.⁶

§ 8. Limitation of Recovery for Breach of Contract.—

Where the value of goods which the buyer has refused to accept equals or exceeds the contract price, so that the seller by exercising reasonable diligence in effecting a resale can avoid all loss to himself, he is entitled only to nominal damages.⁷ And the same is true, where, irrespective of their value, he actually succeeds in reselling the goods at the same price.⁸ So a purchaser who has paid nothing on the purchase price can recover only nominal damages, for the seller's failure to deliver, where he can buy the same goods in the market at no greater cost.⁹ And one whose services, having been contracted for, are refused, and who, during the period covered by the contract earns an equal or greater reward in other employment, is entitled to nominal damages only.¹⁰ A grantee is entitled to nominal damages only for the breach of a covenant against encumbrances, which is one of indemnity merely, unless actual injury has been sustained by him.¹¹

4. *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618.

5. *Harron, Rickard & McCone v. Wilson, Lyon & Co.*, 4 Cal. App. 488, 88 Pac. 512; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380.

6. *Knoch v. Haizlip*, 163 Cal. 146, 124 Pac. 998.

7. *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Lund v. Lachman*, 29

Cal. App. 31, 154 Pac. 295. See SALES.

8. *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406.

9. *Utter v. Chapman*, 38 Cal. 659. See SALES.

10. *Utter v. Chapman*, 43 Cal. 279. See MASTER AND SERVANT.

11. *Frazer v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Woods v. Bennett*, 40 Cal.

But merely nominal damages are inappropriate when the contracting vendor willfully refuses to keep his covenant to convey land, merely because the land has appreciated in value.¹²

§ 9. Denial of Nominal Damages.—Instances sometimes occur, of breach of contract for which even nominal damages may be denied. Thus, where no actual damage was shown to have followed the breach of a contract to exchange properties, it has been held that a judgment for nominal damages would not be given, there being no necessity of conserving in that manner any right which has been infringed and which might be lost by lapse of time.¹³ And a judgment against the plaintiff, entered in sustaining a general demurrer to a complaint of a breach of contract which disclosed a right to recover only nominal damages, in a case where nominal damages would not carry costs and where no question of permanent right was involved, was held not erroneous but proper.¹⁴ Again, it has been held that where no actual damages are recoverable on an injunction bond, nominal damages cannot be recovered thereon, perhaps because, in such a case, there is no real breach of the bond.¹⁵

§ 10. For Torts in General.—In actions ex delicto nominal damages are often given, though no actual damage has been suffered; but a judgment for such damages is jus-

App. 34, 180 Pac. 25. See COVENANTS, vol. 7, p. 776.

12. *Morgan v. Stearns*, 40 Cal. 434. See VENDOR AND PURCHASER.

13. *Strait v. Wilkins*, 23 Cal. App. 774, 139 Pac. 911.

14. *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75.

15. *Bustamente v. Stewart*, 55 Cal. 115 (where the maxim "de minimis non curat lex" was in-

voked). See, also, *Willson v. McEvoy*, 25 Cal. 169, where nominal damages were denied by recourse to the maxim "de minimis non curat lex" in an action upon an injunction bond, it appearing that while a liability arose under the bond, no damages were suffered by the plaintiff. And see in general as to the maxim de minimis, ACTIONS, vol. 1, p. 332.

tified only on the ground that it conserves some right of the plaintiff which has been nominally infringed, and which might otherwise be lost by acquiescence and lapse of time.¹⁶ While the code provides that "when a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages,"¹⁷ a plaintiff is not entitled to recover nominal damages under this provision where the complaint alleges only the breach of defendant's duty to a third person and does not allege any damages for breach of defendant's duty to the plaintiff directly.¹⁸ And where negligence does not result in any actual damage, it will not, it seems, warrant the recovery of nominal damages.¹⁹ On the other hand, a technical false imprisonment entitles the injured person to at least nominal damages.²⁰ And such damages may be allowed for fraud which has apparently worked some injury,¹ or for the wrongful diversion of water from a riparian proprietor,² or for the wrongful exclusion of cattle from their pasturage.³ Every trespass upon real property imports an injury, for which the law gives nominal damages.⁴ And where, in libel, no malice in fact is shown, thus eliminating exemplary damages, and the jury are of the opinion that no actual damage has been suffered, a verdict for nominal damages is still proper.⁵

16. *Stewart v. Sefton*, 108 Cal. 197, 41 Pac. 293.

17. Civ. Code, § 3360 (see, also, supra, § 6).

18. *Pacific Pine Lumber Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103.

19. *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775.

20. *Maher v. Wilson*, 139 Cal. 514, 73 Pac. 418. See FALSE IMPRISONMENT.

1. *Garstang v. Skinner*, 165 Cal. 721, 134 Pac. 329.

2. *Creighton v. Evans*, 53 Cal. 55, See WATERS.

3. *Treadway v. James*, 57 Cal. 137.

4. *Davidson v. Devine*, 70 Cal. 519, 11 Pac. 664; *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810; *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567. See TRESPASS.

5. *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576. See LIBEL AND SLANDER.

§ 11. **Limitation of Recovery for Torts.**—Torts followed by no actual detriment can result only in the recovery of nominal damages. Among these is the wrongful attachment of real estate which has not disturbed the owner's possession,⁶ fraud which has caused no appreciable damage,⁷ and the destruction of a ditch which served no useful purpose.⁸ Where property wrongfully detained from the owner is delivered to him pending suit, the damages allowed for the detention are merely nominal.⁹ The failure of a plaintiff to prove actual injury, as in a personal injury case where there is no evidence as to the monetary value of the plaintiff's loss of time or labor or diminished capacity for work, or of medical expenses, results in merely nominal damages as to the elements of damages affected by the failure of proof.¹⁰ Thus where a complaint for false imprisonment disclosed a mere technical trespass, devoid of malice and oppression, and though alleging damage generally failed to disclose any special damages, or any facts from which an estimate of general damages could be made, a judgment for nominal damages, entered on motion for judgment in the pleadings, was held proper. Had the arrest and detention been without probable cause, however, the rule would be otherwise.¹¹ Collateral heirs must prove probable loss from a wrongful death, or their recovery will be limited to nominal damages.¹²

§ 12. **Inadequacy of Nominal Damages.**—Where there is actual injury of a measurable character, nominal damages are, of course, inadequate. This is especially to be noted in the case of personal torts. Thus, the mere fact that the

6. *Hearth v. Lent*, 1 Cal. 410. See *ATTACHMENT*, vol. 3, p. 555.

7. *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091. See *FRAUD*.

8. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119. See *WATERS*.

9. *Conroy v. Flint*, 5 Cal. 327.

10. *Benjamin v. Stewart*, 61 Cal.

605. See *CLAIM AND DELIVERY*, vol. 5, p. 206.

11. *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322.

12. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *DEATH*.

earning capacity of an injured person has not been diminished, and that he has suffered no pecuniary outlay or detriment, does not reduce his recovery to nominal damages.¹³ Nor can it be said as a matter of law that a wife is entitled to only nominal damages for her husband's death, even though it is not shown that he was earning anything.¹⁴ And the fact that the injured plaintiff was earning nothing when hurt does not restrict him to nominal damages for loss of earning power.¹⁵ The jury in a libel case cannot be restricted to an award of nominal damages, unless they believe that such damages will fully compensate the plaintiff, and that exemplary damages should not be given.¹⁶ And since, in libel, the question of damages is for the jury, the court cannot assume as a matter of law that the plaintiff is entitled to only nominal damages.¹⁷ Nominal damages are inadequate for the injury sustained by a trader or business man from the wrongful dishonor of his check by a bank.¹⁸ And where, in committing a trespass, a door is broken down, breaking the lock and woodwork, such damage is shown as precludes merely nominal damages.¹⁹

13. *Clare v. Sacramento Elec. etc. Light Co.*, 122 Cal. 504, 55 Pac. 326.

14. *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. 1073. See DEATH.

15. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72.

16. *Edwards v. San Jose etc. Publishing Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128.

17. *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Lick v. Owen*, 47 Cal. 252. See LIBEL AND SLANDER.

18. *Reeves v. First Nat. Bank*, 20 Cal. App. 508, 129 Pac. 800. See, however, Civ. Code, § 3320 (added by amendment; Stats. 1917, p. 622), relieving banks of liability beyond actual damages proven, unless non-payment was malicious. See BANKS, vol. 4, p. 242.

19. *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842. See TRESPASS.

III. GROUNDS OF COMPENSATORY DAMAGES.

In General.

§ 13. **Theory of Compensatory Damages.**—Compensatory damages are not the cause of action. The cause of action is given for the wrong, of which damages are the emollient. Hence the accrual of particular damages relates back to the wrong, and is not a basis for a fresh lawsuit.²⁰ A plaintiff, upon establishing his case, is always entitled of right to compensatory damages.¹ And the right to recover civil damages for acts which are also punishable as crimes is preserved by a special statute.² But though the right to compensatory damages is legal and absolute, and both plaintiff and defendant have a right to insist upon their admeasurement by a legal standard, yet the parties may adopt any rule of damages which they deem proper, and if they do adopt such a rule, they are bound by it.³ The object of damages is to give compensation for the loss from the injury sustained.⁴ And they should be exactly commensurate with the injury, neither more nor less.⁵

“The law seeks to give the complaining party the full value of his bargain,—to prevent a loss which the fulfillment of the contract would have prevented,—to put the injured party, so far as money can do it, in the same position as if the contract had been performed.”⁶

20. *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114; *Wood v. Currey*, 57 Cal. 208.

1. *Lewis v. Hayes*, 165 Cal. 527, Ann. Cas. 1914D, 148, 132 Pac. 1022; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

2. Pen Code, § 9. See ACTIONS, vol. 1, p. 317; CRIMINAL LAW, vol. 7, p. 840.

3. *Durkee v. Chino Land & Water Co.*, 151 Cal. 561, 91 Pac. 389. See APPEAL AND ERROR, vol. 2, p. 238.

4. *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546; *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939.

5. *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417. As to exemplary damages, however, see *infra*, § 106 et seq.

6. *Coburn v. California etc. Cement Co.*, 144 Cal. 81, 77 Pac. 771 (per Angellotti, J.).

So, in cases of tort, when there is no basis for an award of exemplary damages, only actual compensation for the detriment sustained can be given.⁷

But the difficulty of arriving, in practice, at the ideal of perfect compensation, is fully recognized by the courts. Thus, in an early case, it was said:

“Rules prescribing the measure of damages based upon such principles of justice and equity as shall be uniform, definite, and exact, are not readily formulated. We know of no branch of the law in which greater conflict and contradictions exist than are to be found in the adjudicated cases on the subject. The most that has been or can be done, is to formulate such arbitrary rules as, the subject to which they are applied considered, will in the great majority of cases afford such measure of indemnity as the ends of justice will warrant. Complete indemnity in its broadest sense cannot and ought not in all cases to be obtained.”⁸

The difficulty of reaching exact compensation has been especially noted in the case of the breach of an agreement to convey land. No other piece of land can duplicate that which the purchaser desires. Pretium affectionis is an important element in the vendee's contract, and this cannot be measured.⁹ And in the case of personal torts, the difficulty is so great that it is relegated to the jury.¹⁰

§ 14. Necessity That Damages be Reasonable.

“Damage must, in all cases, be reasonable, and when an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”¹¹

7. *Maier v. Wilson*, 139 Cal. 514, 73 Pac. 418; *Dorsey v. Manlove*, 14 Cal. 553.

8. *Friend & Terry Lumber Co. v. Miller*, 67 Cal. 464, 8 Pac. 40 (per Searls, C.).

9. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 718. See *VENDOR AND PURCHASER*.

10. See *infra*, § 85.

11. Civ. Code, § 3359.

Occasions have seldom arisen for the application, in practice, of the highly salutary limitation contained in this code section. Under it, however, it has been held that a recovery for the mere wrongful detention of personal property for twenty months, which amounts to three times the value of the property itself, cannot be permitted.¹² And in an action for damages for the breach of an agreement to pay fifteen hundred dollars for conducting the defense of one charged with murder to a young attorney of limited experience, who had never tried such a case, it has been held that such an agreement is unconscionable and contrary to substantial justice, within the meaning of the code provision.¹³

§ 15. Necessity of Detriment in General.—The general rule is that there must be actual loss flowing from the wrong before there can be compensation.¹⁴ Thus, to entitle a master to recover against a common carrier for the detention of his servant, he must show that he had a claim upon the latter for his services.¹⁵ And while a parent, suing in his own behalf for services rendered and expenses incurred in the cure of injuries to his minor child can recover for such expenses as he incurred in healing the wounds suffered, it has been held that he cannot, at his pleasure, pursue a series of expensive surgical operations for the purpose of removing every trace of the injury, and charge the tort-feasor with the expense of such additional operations. In such case, the compensation for such resultant injuries was said to be recoverable at the suit of the minor, and not as expenses incurred by the parent.¹⁶ So sums paid out for board during disability following a personal injury, cannot be recovered in addition to allow-

12. *Mutch v. Long Beach Imp. Co.*, 32 Cal. App. Dec. 89, 190 Pac. 638. 428, 56 Pac. 103. And see cases cited *infra*. See *ACTIONS*, vol. 1, p. 329.

13. *Newmire v. Ford*, 22 Cal. App. 712, 136 Pac. 504.

14. *Pacific Pine Lumber Co. v. Western Union Tel. Co.*, 123 Cal.

15. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 353.

16. *Karr v. Parks*, 44 Cal. 46.

ances for loss of time and expenses of cure, the detriment from the injury not embracing the necessity for food and lodging. This is on the assumption that these expenses were not enhanced by the injury.¹⁷ And money expended by a purchaser in caring for the bought property which, however, was not finally delivered to him, cannot be recovered as an item of special damage in an action for failure to deliver, though storage charges which, under the contract, he was obligated to pay, may be recovered.¹⁸ The principle embodied in these cases is that not only must the wrong have occasioned loss, but it is only for such loss as it has occasioned that compensation can be had, or, in other words, that there must be a causal relation between wrongful act and detriment.¹⁹ But the fact that property wrongfully detained from its owner had been used by him only for pleasure would not prevent his recovery of damages, loss of pleasure being, presumably, a detriment, nor would the fact that the wrongdoer kept it idle and did not profit by its possession affect the question.²⁰ Furthermore, the fact that property has no market value does not preclude a recovery for its loss, where it has a peculiar value to the owner.¹

§ 16. When Damages are Sought as Indemnity.—The general rule is that one cannot recover indemnity for a liability incurred to a third person through the wrongful act of the defendant, until he has actually paid the debt.² This was the common-law rule in actions on indemnity bonds.³ The mere fact that the third person has demanded payment from the plaintiff is not enough, for he

17. *Graeber v. Derwin*, 43 Cal. 495.

18. *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17.

19. See *infra*, §§ 24-40, as to contingent and remote damages.

20. *Mutch v. Long Beach Imp. Co.*, 32 Cal. App. Dec. 89, 190 Pac. 638.

1. *Willard v. Valley Gas & Fuel Co.*, 171 Cal. 9, 151 Pac. 286.

2. *Pacific Pine Lumber Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103; *Wilson v. McEvoy*, 25 Cal. 169.

3. *Wilson v. McEvoy*, 25 Cal. 169.

may never enforce the latter's liability. Nor does section 3283 of the Civil Code authorizing damages for detriment accruing after the commencement of the action or certain to result in the future affect the case, for until he has made payment, the plaintiff has suffered no detriment, nor is any certain to result in the future.⁴ But though the rule is thus clearly stated, it is subject to a rather bewildering array of limitations and exceptions. One of the most obvious of these, is where the plaintiff's liability has not arisen from the defendant's act, but is one previously created by himself, and for which he will be in any event bound, but which the defendant has contracted to discharge. In such a case the defendant is liable for the breach of his agreement, though the plaintiff has not yet paid.⁵ So, before he can recover for the breach of an agreement to build a road, fence or other work or structure, the plaintiff is not bound to construct the thing himself, on the theory that until he does so he has suffered only nominal damages.⁶ And the rule has, of course, no application to injuries to property, which may be compensated in general damages though nothing has been expended for repairs and no liability incurred on that account.⁷

§ 17. Liability Incurred but not Paid—Rule as to Counsel Fees.—In actions for tortious injuries, the recovery may include, as special damages properly pleaded, a liability incurred but not paid, for reasonable and necessary expenses caused by the wrongful act complained of. Such liabilities include the fees of an attorney employed to obtain a discharge from an unlawful arrest,⁸ and physician's bill and other medical expenses incurred for the care

4. *Pacific Pine Lumber Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103.

5. *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216; *Turner v. Howze*, 28 Cal. App. 167, 151 Pac. 751.

6. *Taylor v. Northern Pacific Coast R. R. Co.*, 56 Cal. 317.

7. *Kincaid v. Dunn*, 26 Cal. App. 686, 148 Pac. 235.

8. *Nelson v. Kellogg*, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115. See FALSE IMPRISONMENT.

of bodily injuries sustained.⁹ The law allows such recovery by plaintiff for the reason that the wrongful acts superinduced the incurring of the obligation, and the duty to discharge it is imposed by law on the wrongdoer.¹⁰ It is not necessary that there should even be an express contract by plaintiff to pay for the medical expenses. An implied liability is sufficient.¹¹

Counsel fees.—The general rule stated in the preceding section¹² applies, in general, with full force to counsel fees which cannot be recovered until they have been actually paid.¹³ This is the case where recovery is sought in the action of claim and delivery,¹⁴ on a bond given for the appointment of a receiver, the fees being incurred in having the order of appointment dissolved,¹⁵ and on an injunction bond, after dissolution of the temporary injunction.¹⁶ The rule also applies to actions on attachment

9. *Fisk v. Poplin*, 31 Cal. App. Dec. 786, 189 Pac. 722; *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713; *Nelson v. Kellogg*, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115; *Kimball v. Northern Electric Co.*, 159 Cal. 225, 113 Pac. 156; *McLaughlin v. San Francisco, etc., Ry.*, 113 Cal. 590, 45 Pac. 839; *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546; *Kincaid v. Dunn*, 26 Cal. App. 686, 148 Pac. 235; *McKernan v. Los Angeles Gas etc. Co.*, 16 Cal. App. 280, 116 Pac. 677. See *infra*, § 126, as to effect of allegation of money expended for doctor's bills as limiting proof to those actually paid.

10. *Kimball v. Northern Electric Co.*, 159 Cal. 225, 113 Pac. 156 (holding that the liability will be implied though the nurse employed is the plaintiff's mother); *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546.

11. *Mathes v. Aggeler & Musser Seed Co.*, 179 Cal. 697, 178 Pac. 713.

12. See *supra*, § 16.

13. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563.

So strict is the rule that the fees must be paid, that it has been held that merely giving a note is not enough. *Cook v. Terry*, 19 Cal. App. 765, 127 Pac. 816. See *infra*, § 21, as to counsel fees constituting special damages; *infra*, §§ 60-64, as to recovery of counsel fees in general; and *infra*, § 126, as to sufficiency of allegation of payment of counsel fees.

14. *Maitland v. Bekin Van & Storage Co.*, 19 Cal. App. 283, 125 Pac. 759.

15. *Cook v. Terry*, 19 Cal. App. 765, 127 Pac. 816.

16. *Nelson v. Kellogg*, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115; *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11;

bonds.¹⁷ But the fact that payment was made after the period covered by the bond had expired is immaterial, the retainer having been paid before.¹⁸ And even payment before a retrial, after reversal on appeal, is sufficient, under section 3283 of the Civil Code, authorizing recovery of damages accruing after the commencement of the action.¹⁹

§ 18. Liability of Joint and Several Tort-feasors.—In an action for compensatory damages against joint tort-feasors, the law will not permit an apportionment of damages, since it will not attempt to measure the degrees of culpability of the various defendants.²⁰ But where damage results in fact from the acts of third persons with which the defendant had no connection, he cannot be held liable for the whole, the failure occasioned by the acts of others, not being proximately caused by him.¹ Yet damages from the combined effects of the separate acts of individuals, who are not joint tort-feasors, may be estimated as to the one sued, as can best be done from the evidence, and in doing so the court may measure with a liberal hand, the difficulty of precise ascertainment being a circumstance of defendant's own wrong.²

§ 19. Distinctions Between General and Special Damages.—Damages are either general or special. General damages are such as the law implies, or presumes to have ac-

Hooper v. Patterson, 3 Cal. Unrep. 811, 32 Pac. 514.

17. Nelson v. Kellogg, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115.

18. Prader v. Grim, 13 Cal. 585.

19. Cook v. Terry, 19 Cal. App. 765, 127 Pac. 816.

20. Davis v. Hearst, 160 Cal. 143, 116 Pac. 530.

A plaintiff is entitled to a joint

recovery of damages against such defendants as he can show have united or co-operated in inflicting a wrong upon him. Revert v. Hesse, 184 Cal. 295, 193 Pac. 943 (involving a conspiracy). See CONSPIRACY, vol. 5, p. 499 et seq.

1. Durgin v. Neal, 82 Cal. 595, 23 Pac. 133.

2. California Orange Co. v. Riverside Portland Cement Co., 34 Cal. App. Dec. 61, 195 Pac. 694.

crued from the wrong complained of.³ Or, as is often said, general damages are those which necessarily result from the wrongful act.⁴ Special damages, on the other hand, though such as really took place, are not implied by law, but are either superadded to general damages arising from an act injurious in itself, or are caused by an act indifferent and not actionable in itself, but only injurious in its consequences.⁵ They are the natural, but not the necessary, result of the act complained of.⁶ They are such as do not ordinarily arise from the wrong, but depend upon the peculiar circumstances of the case.⁷ The fact that a plaintiff seeks the recovery of special damages does not preclude the recovery of general damages.⁸ And, vice versa, the fact that, under the circumstances of the particular case, the defendant is not liable for general damages, does not prevent the recovery of special damages against him.⁹ Sections 3313 and 3314 of the Civil

3. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Moore v. Fredericks*, 24 Cal. App. 536, 141 Pac. 1049.

4. *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266; *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979; *Moore v. Fredericks*, 24 Cal. App. 536, 141 Pac. 1049; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690.

5. *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107.

6. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119; *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266; *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46; *Robinson v. Rispin*, 33 Cal. App. 536, 165

Pac. 979; *Moore v. Fredericks*, 24 Cal. App. 536, 141 Pac. 1049; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690.

7. *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415. See *infra*, §§ 28-30, as to damages with-in contemplation of the parties.

8. *Hamer v. Ellis*, 40 Cal. App. 57, 180 Pac. 30. See *infra*, § 128, as to pleading general damages. See *Harrelson v. Miller & Lux, Inc.*, 182 Cal. 408, 188 Pac. 800, holding that it was error to fail to find upon the issue of special damage set up by cross-complaint where the damages were capable of ascertainment by proof to a reasonable certainty. *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200.

9. *Lichtenthaler v. Samson Iron Works*, 32 Cal. App. 220, 162 Pac. 441. See *infra*, § 127, as to pleading special damages.

Code, fixing a measure of damages for breach of warranty of an article of personal property sold for a particular use, fix only the general damages recoverable, and do not preclude the recovery of special damages.¹⁰

§ 20. Illustrations of General Damages.—The following may be noted as illustrative of general damages for breach of contract: the cost of constructing a work which the contractor has failed to build, less the unpaid contract price;¹¹ the expense of procuring electric power elsewhere, with which to operate pumps furnishing irrigating water, and thus avoid more serious damages from a breach of contract to furnish electric power;¹² a consideration paid for property which, instead of being such as agreed, proves to be utterly worthless;¹³ the damage sustained by a trader or business man from the wrongful dishonor of his check by a bank;¹⁴ the loss of consideration paid by a vendee, following the vendor's refusal to convey as agreed;¹⁵ the loss of profits which would have been realized from the completion of a contract;¹⁶ and loss of profits on a general sale in the market of goods not up to sample.¹⁷

Damages for the wrongful detention of personal property, allowed by section 667 of the Code of Civil Procedure, may be general, or special, or both.¹⁸ The depreciation in

10. *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200.

11. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46.

12. *Terrace Water Co. v. San Antonio etc. Co.*, 1 Cal. App. 511, 82 Pac. 562.

13. *Hullinger v. Big Sespe Oil Co.*, 28 Cal. App. 69, 151 Pac. 369.

14. *Reeves v. First Nat. Bank*, 20 Cal. App. 508, 129 Pac. 800; *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939. But see Civ. Code, § 3320 (added by amendment; see Stats. 1917, p. 662), modifying the liability of banks in such cases.

15. *Moore v. Fredericks*, 24 Cal. App. 536, 141 Pac. 1049.

16. *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979; *McLaughlin v. McLaughlin*, 17 Cal. App. 699, 121 Pac. 704.

17. *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319.

18. *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690. See CLAIM AND DELIVERY, vol. 5, p. 206.

value of property wrongfully detained from the owner is an element of damages naturally to be anticipated, and is therefore to be deemed general damages.¹⁹ General damages for wrongs may also include such as the following: injuries to the feelings from an unlawful arrest;²⁰ physical inconvenience and mental suffering and humiliation, following a false imprisonment;¹ consequences which naturally follow from a personal injury, because of the nature of the injury;² such as bodily pain and suffering,³ mental suffering,⁴ and humiliation.⁵ General damages are allowed also for permanent detriment,⁶ such as impaired earning capacity,⁷ or the creation or aggravation of disease,⁸ and loss of services, and deprivation of the comfort, society and protection of a minor child by his death wrongfully occasioned.⁹

§ 21. Illustrations of Special Damages.—Damages for breach of contract which are special in their character include such as the following: Loss of rents resulting to the owner from a contractor's failure to complete a build-

19. *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690.

20. *Shatto v. Croker*, 87 Cal. 629, 25 Pac. 921.

1. *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322.

2. *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 Pac. 839.

3. *Shatto v. Croker*, 87 Cal. 629, 25 Pac. 921; *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322.

4. *Kemp v. Van Bezel*, 35 Cal. App. Dec. 492, 199 Pac. 1099; *Freiberg v. Israel*, 45 Cal. App. 138, 187 Pac. 130; *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322; *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693.

5. *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322.

6. *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266; *Scrogg v. Saller*, 24 Cal. App. 133, 140 Pac. 706.

7. *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 Pac. 839; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108.

8. *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 70 Pac. 624; *Lauder v. Currier*, 3 Cal. App. 28, 84 Pac. 217. See *infra*, §§ 65-70, as to measure and elements of damages for personal injuries.

9. *Young v. Fresno etc. Irr. Co.*, 24 Cal. App. 286, 141 Pac. 29. See DEATH.

ing in time;¹⁰ damages claimed by a purchaser solely on account of the seller's delay in delivery;¹¹ damages for the breach of a warranty of fitness for a particular purpose, as prescribed in section 3314 of the Civil Code;¹² expenses incurred by a vendee in examining title and preparing papers, following the vendor's breach of agreement to convey land;¹³ attorney's fees, provided by a contract to be paid in case of suit for its breach;¹⁴ attorney's fees paid by an owner in freeing his building from mechanics' liens which the contractor had allowed to be filed in violation of the building contract;¹⁵ attorneys' fees and other expenses incident to procuring a release from false imprisonment.¹⁶ And where one agrees to buy land at tax sale and hold it in trust for the owner, but violates the agreement by selling the certificate of sale to a third person who sues the owner to quiet title, counsel fees and other expenses incurred by the owner in defending the suit are special damages.¹⁷ Likewise, where a contract to construct a railroad across the land of one of the parties and to the center of an adjacent city is broken, the damage resulting to the land owner from the deprivation of the convenience of communication with the center of the city is in the nature of special damages.¹⁸

10. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

11. Judson Mfg. Co. v. Lutge, 174 Cal. 566, 163 Pac. 1017; Dabovich & Co. v. Emeric, 12 Cal. 171; Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288.

12. Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 88 Pac. 512.

13. Moore v. Fredericks, 24 Cal. App. 536, 141 Pac. 1049.

14. De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45; Brooks v. Farington, 117 Cal. 219, 48 Pac. 1073; Prescott v. Grady, 91 Cal. 518, 27 Pac. 755;

City Inv. Co. v. Pringle, 33 Cal. App. Dec. 209, 193 Pac. 504; Eastman v. Sunset Park Land Co., 35 Cal. App. 628, 170 Pac. 642. See supra, § 17, as to necessity for payment of fees; and see infra, §§ 60-64, as to recovery of counsel fees in general.

15. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

16. Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860. See FALSE IMPRISONMENT.

17. Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618.

18. Smith v. Los Angeles etc. Ry. Co., 98 Cal. 210, 33 Pac. 53.

Losses and injuries occasioned by torts in instances such as the following are in the nature of special damages; loss of debts due to the destruction of an account book;¹⁹ the loss of an opportunity to make an advantageous sale of corporate stock through its wrongful attachment;²⁰ the loss resulting from the failure of a third person to enter into a contract with plaintiff, owing to the infringement of the latter's trade name by defendant;¹ diminution in the amount of tolls collected in a private toll road, because of the wrongful obstruction of a connecting highway;² in an action for the pollution of a stream, the expense of boiling and skimming polluted water for domestic use, and inability to rent the complainant's property;³ loss of profits because of personal injuries suffered, rendering one incapable of continuing the business in which such profits might have been realized.⁴ And an action for wrongfully occasioning death brought under the statute, funeral expenses, if recoverable at all, are special damages.⁵ The fact that animals were wrongfully detained and were kept on poor pasturage and lost flesh is a matter of special damage, not arising from the detention itself. And the detention of a brood mare during the breeding season, whereby the season was lost, is special damage, depending upon the extraordinary value of the animal for a particular purpose.⁶

19. *Nunan v. City and County of San Francisco*, 38 Cal. 689.

20. *McCarthy Co. v. Boothe*, 2 Cal. App. 170, 83 Pac. 175.

1. *Mills v. San Diego Conservatory of Music*, 32 Cal. App. Dec. 93, 60 Cal. Dec. 34, 191 Pac. 546.

2. *Lewiston Turnpike Co. v. Shasta & W. Wagon Road Co.*, 41 Cal. 562.

3. *Pötter v. Froment*, 47 Cal. 165.

4. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108.

5. *Gay v. Winter*, 34 Cal. 153. See DEATH.

6. *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107. See ANIMALS.

Future, Uncertain, Speculative and Remote Damages.

§ 22. Recovery of Future Damages.—The Civil Code provides that:

“Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.”⁷

Under this provision, not only may proof of damage extend to all matters up to the time of verdict, which are the natural results of the wrong done,⁸ but prospective damages may be allowed in a proper case.⁹ Prospective damages must, however, be certain,¹⁰ or, at least, reasonably certain, to occur.¹¹ The fact that in the minds of the jurors the disability is likely to, or will probably, follow is not enough.¹² Upon this subject it has been said:

“The jury may proceed upon reasonable probabilities, and accept as proved those results which, under like circumstances, generally come to pass. It is not, however, to be hence inferred that prospective damages may be recovered on every plausible anticipation, nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events; it is only intended that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration.”¹³

7. Civ. Code, § 3283.

8. Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Hicks v. Herring, 17 Cal. 566. See *infra*, § 144, as to instructions on future detriment.

9. Baker v. Southern Pac. Co., 184 Cal. 357, 193 Pac. 765; Alderson v. Houston, 154 Cal. 1, 96 Pac. 884; Kemp v. Van Bezel, 35 Cal. App. Dec. 492, 199 Pac. 1099. See De Costa v. Massachusetts etc. Mining Co., 17 Cal. 613, for the same rule prior to the adoption of the code.

10. De Costa v. Massachusetts etc. Mining Co., 17 Cal. 613.

11. Alderson v. Houston, 154 Cal. 1, 96 Pac. 884; Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 Pac. 436.

12. Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 Pac. 436.

13. Alderson v. Houston, 154 Cal. 1, 96 Pac. 884 (per Shaw, J., quoting from Sutherland on Damages, § 121).

Under the statute, prospective damages to real property may be allowed, where the injury is permanent in character.¹⁴ Damages from the wrongful detention of personalty may be recovered though they have not all accrued when suit is begun.¹⁵ But future damages for the anticipated wrongful detention of personalty subsequent to judgment for its restoration cannot be awarded.¹⁶ The recovery of future damages extends to personal injury cases,¹⁷ and includes mental suffering,¹⁸ loss of future earnings,¹⁹ and the loss of a prospective promotion.²⁰

§ 23. Uncertain Damages.—The Civil Code provides that:

“No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.”¹

Under this statute, it has been held that damages to a contractor resulting from the owner's refusal to allow him to sink certain oil wells as contracted for, are fairly ascertainable both in nature and origin.² But damages to health, feelings or reputation from a wrongful discharge from employment are not ascertainable within the rule,³ nor are those occasioned a litigant by the adverse deter-

14. *Williams v. Southern Pacific R. R. Co.*, 150 Cal. 624, 89 Pac. 599.

15. *McCusker v. Walker*, 77 Cal. 208, 10 Pac. 382.

16. *Los Angeles Furniture Co. v. Hensen*, 31 Cal. App. Dec. 391, 188 Pac. 292.

17. *Aldrich v. Palmer*, 24 Cal. 513; *Scully v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325.

18. *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693. See *infra*, § 34, as to mental suffering from apprehension of future detriment.

19. *Bonneau v. North Shore R. Co.*, 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106; *Ehat v. Scheidt*, 17 Cal. App. 430, 120 Pac. 49.

20. *Baker v. Southern Pac. Co.*, 184 Cal. 357, 193 Pac. 765. See *infra*, §§ 36-40, as to recovery of prospective profits; and *infra*, § 133, as to admissibility of evidence in personal injury cases.

1. Civ. Code, § 3301.

2. *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 Pac. 865.

3. *Westwater v. Rector etc. of Grace Church*, 140 Cal. 339, 73 Pac. 1055.

mination of legal proceedings, charged to have been due to the unjustifiable withdrawal of an attorney first employed, whose marked ability and superior knowledge of the facts might have brought about a different outcome.⁴ It is a general principle that, as damages or compensation must be measured by the loss sustained, where that loss cannot be ascertained, damages cannot be recovered.⁵ Thus, the fact that twenty acres produced nine thousand dollars' worth of produce does not necessarily support the conclusion that two hundred acres would yield ninety thousand dollars, and damages based on such a calculation cannot be given.⁶ And, under section 3358 of the Civil Code, providing that one cannot recover more for the breach of an obligation than he would have realized from its fulfillment, one who agrees to render services and make expenditures for another, cannot recover compensation for services where it does not appear that, were the expenditures made, anything would be left as compensation for the services, and where compensation for services under the contract was left wholly to conjecture.⁷ In a case where the lessor of mining claims sought damages against the lessee for failure to work them, and proved the amount of pay gravel remaining unworked, the capacity of defendant's machinery, the number of working days included in defendant's default, the average yield of gold from the gravel, and the best percentage of royalty plaintiff could have obtained from other sources, damages based on calculation from such evidence have been held not uncertain.⁸ And where one promises to make payment out of the proceeds of a certain mine, and then by

4. *Lane v. Storke*, 10 Cal. App. 347, 101 Pac. 937.

5. *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75. See *infra*, § 142, as to weight and sufficiency of evidence.

6. *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313.

7. *Newmire v. Ford*, 22 Cal. App. 712, 136 Pac. 504.

8. *Northern Light Min. Co. v. Blue Goose Min. Co.*, 25 Cal. App. 282, 143 Pac. 540. See *infra*, § 142, as to sufficiency of evidence.

his own act renders performance impossible, he cannot be heard to say that, the proceeds being in any event uncertain, there may have been no actual damage to the creditor.⁹ Indeed, it is a general principle that one who breaks a contract or commits a tort, cannot wholly escape liability because of the difficulty his own wrong has created of accurately determining the damage.¹⁰ Nor can he complain of the uncertainty.¹¹ This rule has been applied to loss of profits,¹² to future damages following discharge from employment,¹³ to items of expense occasioned an employee by a wrongful discharge,¹⁴ and to the difficulty of apportioning damage between tort-feasors.¹⁵ But where there is no possibility of a reasonably proximate estimate of damages, the wrongdoer, it seems, cannot be held.¹⁶

§ 24. Speculative Damages.—The mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish foundation for a recovery.¹⁷ Thus, damages aris-

9. *Grant v. Warren*, 31 Cal. App. 453, 160 Pac. 847.

10. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979.

11. *California Orange Co. v. Riverside Portland Cement Co.*, 34 Cal. App. Dec. 61, 195 Pac. 694; *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *Baldwin v. Bennett*, 4 Cal. 392; *Northern Light M. Co. v. Blue Goose M. Co.*, 25 Cal. App. 282, 143 Pac. 540.

12. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Pacific*

etc. Co. v. Alaska Packers' Assn., 138 Cal. 632, 72 Pac. 161; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62. See *infra*, §§ 36-40, as to uncertainty of anticipated profits.

13. *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88. See *MASTER AND SERVANT*.

14. *Cederberg v. Robinson*, 100 Cal. 93, 34 Pac. 625.

15. *California Orange Co. v. Riverside Portland Cement Co.*, 34 Cal. App. Dec. 61, 195 Pac. 694; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

16. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161. See *infra*, §§ 34, 35, as to mental suffering.

17. *McQuilkin v. Postal Tel. Cable Co.*, 27 Cal. App. 698, 151 Pac. 21. See *infra*, § 119, as to

ing from the failure to receive an appointment as deputy city assessor, owing to the negligence of a telegraph company in not promptly delivering a message, are too speculative and uncertain to form the basis of a recovery, since, says the court, though plaintiff might have received the appointment, it does not appear that he would have retained it for any definite length of time, his retention of the place being necessarily at the pleasure of his superior.¹⁸ Damage for the extension of disease resulting from personal injuries, which is not shown likely to occur in the particular case on trial, are too speculative for recovery.¹⁹ Rents to accrue under leases which the lessor was unable to fulfill because he did not get title to the land are too speculative in character to be recovered against one whose breach of contract prevented the acquisition of title.²⁰

It has been held that damages are not speculative where they represent the difference between the actual value of goods sold by sample, and what they would have been worth in the market had they been according to sample.¹ And money loss occasioned the purchaser of a stallion for breeding purposes, through the animal's lack of reproductive potency and the consequent failure of the mares bred to him to have colts, is not too speculative or conjectural to be recovered as damages for a breach of the warranty of the animal's fitness.² The fact there is no specific testimony that the plaintiff in a personal injury case was earning anything at the time he was hurt, or of the amount

allowance of speculative damages being for the jury; and *infra*, § 144, as to instructions.

18. *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75.

19. *Yeager v. Southern California Ry. Co.*, 5 Cal. Unrep. 870, 51 Pac. 190.

20. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46.

1. *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319. See SALES.

2. *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351. See *infra*, §§ 36-40, as to objection that lost profits are speculative.

he was capable of earning, does not render a recovery for loss of earning capacity conjectural.³

§ 25. Remote Damages from Breach of Contract, in General.—To warrant a recovery of damages, a causal connection must exist between the breach and the detriment. This necessity is recognized by the provision of the Civil Code which fixes the measure of damages for breach of contract as the amount which will compensate for “all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.”⁴ To be proximately caused by the breach, as thus required, damages must be such as next immediately follow and are produced by the act complained of,⁵ or such as in the ordinary course of things would be likely to result therefrom.⁶ And where one in bad faith violates his contract, damages may include even loss which could not be foreseen at the time of making the contract.⁷ Otherwise stated, the breach must be the efficient cause of the detriment, the one that necessarily sets other causes in operation. Causes which are merely incidental, or instruments of some other controlling agency, are not proximate within the purview of the law. Proximate is defined as immediate, nearest, next in order.⁸ No hard-and-fast rule can be formulated to determine with invariable certainty to what cases the section applies. Application must de-

3. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72. See *infra*, § 34, as to mental suffering not being speculative; and see *infra*, § 142, as to sufficiency of evidence.

4. Civ. Code, § 3300.

5. *Westwater v. Rector etc. of Grace Church*, 140 Cal. 339, 73 Pac. 1055; *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40; *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858, 864.

6. *Friend & Terry L. Co. v. Miller*, 7 Cal. 464, 8 Pac. 40; *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952; *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858, 864. See note, 1 A. L. R. 156, as to breach of contract preventing operation of nonindustrial business in contemplation but not established or in actual operation.

7. *Overstreet v. Merritt*, 186 Cal. 494, 200 Pac. 11.

8. *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53.

pend upon the facts of the given case.⁹ Remote results, produced by intermediate sequences of causes, are beyond the reach of any just and practicable rule of damages.¹⁰ And the mere fact that injury and breach of contract are contemporaneous, or that the former occurs subsequently to the latter, does not establish that the injury is the result of the breach.¹¹

§ 26. Illustrations of Remote Damages.—Damages which a plaintiff has sustained through inability to perform his contract with a third person, owing to defendant's breach of contract with him, are ordinarily too remote to be recovered.¹² Other damages held to be too remote to admit of recovery in an action at law include the following: Damages from the lender's breach of agreement to loan money, whereby the borrower was compelled to default in the payment of certain obligations which were later enforced against him with disastrous results;¹³ damages from inability to borrow money on real estate because the abstractor failed to finish the abstract in time, though with the loan the owner might have made an advantageous purchase of other property;¹⁴ damages to one insured because the insurance company willfully refused to pay a loss, thereby preventing him from re-establishing his business;¹⁵ expenditures by a seller of goods, in making certain busi-

9. *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710. See note, 1 A. L. R. 156, as to measure of damages for breach of contract preventing operation of nonindustrial business in contemplation, but not established or in actual operation.

10. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368. See *infra*, §§ 36-40, as to objection that lost profits are remote.

11. *Lacy Mfg. Co. v. Los Angeles Gas etc. Co.*, 12 Cal. App. 37, 106 Pac. 413. See *supra*, § 15, as

to the necessity of detriment as a basis for compensatory damages.

12. *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288.

13. *Savings Bk. of Southern California v. Asbury*, 117 Cal. 96, 48 Pac. 1081.

14. *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659.

15. *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275. See *infra*, §§ 36-40, as to recovery for loss of profits.

ness trips because the buyer refused to accept them, and loss of time incident thereto;¹⁶ an excess price paid by a commission agent for goods similar to those which his principal wrongfully refused to furnish him, the transactions being independent;¹⁷ loss of rents which tenants could not pay because they failed to make crops owing to lack of irrigating water, and loss due to failure to make an advantageous lease from the same cause;¹⁸ damages caused by overloading a gas plant because generators were not furnished within the time agreed;¹⁹ and damages to a tenant through forced surrender of his lease because of the unskillful work of one whom he hired to work on the premises.²⁰ Likewise, it cannot be said that stock agreed to be issued in a prospective corporation which was never organized because no raw material for its operations could be obtained, would ever have any value "in the ordinary course of things," so as to render the deprivation of it a substantial detriment.¹ And injury to health, feelings or reputation, occasioned by a wrongful dismissal from employment, is neither proximately caused by the breach nor likely to result in the ordinary course of things.²

§ 27. Illustrations of Direct Damages.—The difference between the contract price for an article, and that at which the seller could have obtained it, is the detriment proximately caused him by the buyer's refusal to accept.³ A seller of goods which the buyer refuses to take, who elects to hold them as trustee for the latter, not only may

16. *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858.

17. *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427.

18. *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200.

19. *Lacy Mfg. Co. v. Los Angeles Gas etc. Co.*, 12 Cal. App. 37, 106 Pac. 413.

20. *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581.

1. *Eisenmayer v. Leonhardt*, 148 Cal. 596, 84 Pac. 43.

2. *Westwater v. Rector etc., of Grace Church*, 140 Cal. 339, 73 Pac. 1055.

3. *Thompson v. Hamilton Motor Co.*, 170 Cal. 737, Ann. Cas. 1917A, 677, 151 Pac. 122. See *SÁLES*.

but must at his peril take care of them, and is entitled to compensation therefor as consequential damages, the causal sequence being sufficiently close. This doctrine applies also to such as storage charges, expenditures incident to the feeding and care of animals, and assessments paid to protect corporate stock.⁴ Other instances of direct damages for breach of contract include the following: the outlay by a purchaser in preparation for the receipt of goods which the seller failed to deliver;⁵ loss of time in getting a mill into operation, due to a failure to deliver machinery according to contract, and the value of lost services of employees and the wages paid during the delay;⁶ damages due to a partial performance of a contract by one of the parties, where complete performance which would compensate for the injury is refused;⁷ loss due to failure or partial failure of crops where occasioned by lessor's breach of an agreement to install headgates;⁸ loss due to the shelling out of ripe grain where such loss would have been avoided had a contract for its harvesting been performed in time;⁹ loss due to securing another location following the wrongful refusal to lease a store-room as agreed;¹⁰ and attorney's fees paid out by the owner in freeing a building from mechanics' liens which the contractor had allowed to be filed in violation of the building contract.¹¹

§ 28. Damages in Contemplation of the Parties.—Damages that can be recovered for breach of contract are only

4. *Gay v. Dare*, 103 Cal. 454, 37 Pac. 466.

5. *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288.

6. *Kenyon v. Goodall*, 3 Cal. 257.

7. *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53 (applying the rule to a railroad company's breach of agreement to extend to a neighboring city a road which it had built under the contract across an owner's land).

8. *Chambers v. Belmore Land etc. Co.*, 33 Cal. App. 78, 164 Pac. 404. See *infra*, §§ 36-40, as to recovery for loss of profits.

9. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708.

10. *Schnierow v. Boutagy*, 33 Cal. App. 336, 164 Pac. 1132.

11. *Tally v. Ganahl*, 151 Cal. 418, 90 Pac. 1049.

such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote.¹² But the rule is not one of limitation merely. It is also one of affirmative right. That is to say, the injured party has a right to recover such damages, where a breach of the contract occurs.¹³ The rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought, must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known, to them, to have considered as likely to follow a breach, in the ordinary course of things, and, therefore, to have in effect stipulated against. The understanding and intention of the parties in this regard must of course be ascertained from the language of the contract, in the light of such facts.¹⁴ Special circumstances communicated by one party to the other, or known to both, are, of course, controlling.¹⁵ And the parties will also be held to have contracted with a view to the damages legally provided for in case of a breach, as well as any expense one of them may have been put to, to reduce

12. Civ. Code, § 3300; *Hunt Bros. Co. v. San Lorenzo etc. Co.*, 150 Cal. 51, 7 L. R. A. (N. S.) 913, 87 Pac. 1093; *Schnierow v. Boutagy*, 33 Cal. App. 336, 164 Pac. 1132; *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858, 864; *Pacific Union Club v. Commercial etc. Co.*, 12 Cal. App. 503, 107 Pac. 728. See cases *infra*, this section, and *infra*, § 30.

13. *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200; *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46; *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952; *Grosse v.*

Petersen, 30 Cal. App. 482, 158 Pac. 511; *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365; *Erie City Iron Works v. Tatum*, 1 Cal. App. 286, 82 Pac. 92.

14. *Hunt Bros. Co. v. San Lorenzo etc. Co.*, 150 Cal. 51, 7 L. R. A. (N. S.) 913, 87 Pac. 1093.

15. *Kline v. Guaranty Oil Co.*, 167 Cal. 476, 140 Pac. 1 (holding that where a contract was entered into in bad faith, damage arising from special circumstances known to both parties are recoverable); *Grosse v. Petersen*, 30 Cal. App. 482, 158 Pac. 511; *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365.

the loss sustained by the other's default.¹⁶ The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has been damaged to the extent of his actual loss and his outlay fairly incurred.¹⁷

§ 29. Illustrations of Damages Within Contemplation of Parties.—Damages in contemplation of the parties within the meaning of section 3300 of the Civil Code may include loss of profits on a resale due to a breach;¹⁸ injury to an orchard from failure to furnish irrigating water as agreed, the use intended and the fact that water could not be obtained elsewhere being known to the defaulting party;¹⁹ loss of crops, seed, and rental value of the land, due to failure of a gas engine used to pump irrigating water, to work properly, in violation of a warranty, the seller of the engine knowing its intended use;²⁰ loss of the use and occupation of land because of a contractor's failure to complete a levee;¹ and damages proximately resulting to a contractor from a materialman's failure to deliver materials promptly, though he knew the necessity therefor.² In a case where a contract called for the continuance of an instituted water service to put out fire, loss by fire as a result of breach has been held to be within the contempla-

16. See *infra*, § 119, as to determination of question whether damages were within contemplation of parties, being a question for the jury.

17. *Terrace Water Co. v. San Antonio etc. Co.*, 1 Cal. App. 511, 82 Pac. 562.

18. *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319.

19. *Roberts v. Krafts*, 141 Cal. 20, 74 Pac. 281.

20. *Cohn v. Bessemer Gas Engine*

Co., 44 Cal. App. 85, 186 Pac. 200. See *infra*, §§ 37, 40, as to profits within contemplation of the parties.

1. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46.

2. *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365. But see *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40, where it was held that a failure of plaintiff to deliver materials was not a proximate cause of defendant's failure to receive compensation on his contract.

tion of the parties. So, also, when such a service was contracted for to begin at a definite time, especially if special circumstances rendering prompt commencement essential were known to the parties.³ And where a salesman had a secret formula, and contracted with a manufacturer to manufacture a commodity according to it, and proceeded to incur expense and spend time in creating a market, and more money in furnishing ingredients and paying for deliveries, he could recover for these items as within the contemplation of the parties, following the manufacturer's production of a spurious and inferior article.⁴ It has been held that damages to a debtor from seizure and sacrifice of his property at suit of an unsatisfied creditor who should have been paid by a third person with whom the debtor deposited money for payment of the debt but who failed to pay it, are recoverable for the latter's breach, if the likelihood of such a result was known to him.⁵

§ 30. Illustrations of Damages not Within Contemplation of Parties.—Time and money expended by a seller of goods, in making business trips necessitated by the buyer's refusal to accept, are not within the contemplation of the parties.⁶ Loss of money paid by a vendor to the holder of the title to secure an extension of an option upon the property, because the purchaser's default had prevented the exercise of the original option, is too remote, though the purchaser knew that the purchase money was to be applied on the option and had agreed to pay it directly to the title holder.⁷ Other instances where the loss or damage occasioned was not in the contemplation of the parties include the following: loss was due to delay

3. *Hunt Bros. Co. v. San Lorenzo*,
etc. Co., 150 Cal. 51, 7 L. R. A. (N.
S.) 913, 87 Pac. 1093.

4. *Grosse v. Petersen*, 30 Cal. App.
482, 158 Pac. 511.

5. *Mitchell v. Clarke*, 71 Cal. 163,
60 Am. Rep. 529, 11 Pac. 882.

6. *Albion Lumber Co. v. Lowell*,
20 Cal. App. 782, 130 Pac. 858, 864.

7. *Albion Lumber Co. v. Lowell*,
20 Cal. App. 782, 130 Pac. 858, 864.

in collecting from a subvendee, and attorney's fees incurred in suing him, on a breach of warranty;⁸ the rental value of a plant rendered idle by the attempted use of defective machinery, because of a breach of the contract of sale and warranty of the machinery;⁹ loss of rents to accrue under leases executed after the lessor knew that, because of a third party's breach of contract with him he could not get title;¹⁰ damages from inability to resume business because an insurance company willfully refuses to pay a loss;¹¹ loss sustained by a prospective lessee of a storeroom, in disposing of his business elsewhere, as a consequence of a refusal to make the lease;¹² and in a case where a contract for the installation of a water service to extinguish fire fixes no time for performance, and the user is not obligated to pay for it until it begins, it has been held that he cannot be considered as relying on it in advance of actual installation, and a loss by fire before then is not within the contemplation of the parties as damages following a failure to install.¹³

§ 31. Remote Damages from Torts—In General.—The Civil Code defines the general measure of damages from torts as the amount which will compensate for all the detriment "proximately caused thereby, whether it could have been anticipated or not."¹⁴ A distinction is drawn between the causal connection between default and detriment necessary in the case of contracts, and the similar con-

8. *Erie City Iron Works v. Tatum*, 1 Cal. App. 286, 82 Pac. 92.

9. *Burrell v. Southern California C. Co.*, 35 Cal. App. 162, 169 Pac. 405. See *supra*, § 27, as to damages from materialman's failure to deliver materials promptly.

10. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46.

11. *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275.

12. *Schnierow v. Boutagy*, 33 Cal. App. 336, 164 Pac. 1132.

13. *Hunt Bros. Co. v. San Lorenzo etc. Co.*, 150 Cal. 51, 7 L. R. A. (N. S.) 913, 87 Pac. 1093. And see *Brookings L. & B. Co. v. Manufacturers' etc. Co.*, 173 Cal. 679, 161 Pac. 266, to the effect that a failure to complete a fire-extinguishing apparatus in time is not the proximate cause of a loss by fire.

14. Civ. Code, § 3333.

nection necessary in the case of torts. In the case of contract, the damage must have been within the reasonable contemplation of the parties,¹⁵ whereas in case of tort, the tort-feasor is liable whether the damage could have been anticipated or not.¹⁶ But notwithstanding this enlargement of liability in the case of torts, the causal connection must still exist, the detriment must be the legal and natural consequence arising from the tort itself. Damages remotely caused are not recoverable.¹⁷ Thus, in an early case, it was said that the term "compensation," as applied to a wrongful taking of personal property, was confined solely to the injury done to the property itself, and did not include any collateral or consequential damages, unless circumstances of aggravation were shown.¹⁸

§ 32. Illustrations of Remote Damages.—Where only real estate is attached, and the owner's possession of that is not disturbed, depreciation in the value of the land is too remote to constitute a basis of damages for wrongful attachment.¹⁹ And the same is true of injury to credit and reputation from the attachment,²⁰ and of inability to sell the land or contract a loan on it.¹ Consequential damages for the detention of money under legal process cannot be recovered. In such case, only legal interest is al-

15. See *supra*, § 28.

16. *Hunt Bros. Co. v. San Lorenzo etc. Co.*, 150 Cal. 51, 7 L. R. A. (N. S.) 913, 87 Pac. 1093; *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114; *Adams v. Cameron*, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286.

17. *Burkett v. Griffith*, 90 Cal. 532, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527 (where the damage was occasioned by the wrongful act of a third party, remotely induced by the original tort); *Chidester v. Consolidated*

People's Ditch Co., 53 Cal. 56; *Heath v. Lent*, 1 Cal. 410; *McQuilkin v. Postal Tel. Cable Co.*, 27 Cal. App. 698, 151 Pac. 21. See *infra*, § 143 as to instructions.

18. *Dorsey v. Manlove*, 14 Cal. 553. And see to the same effect: *Phelps v. Owens*, 11 Cal. 22.

19. *Heath v. Lent*, 1 Cal. 410.

20. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563; *Heath v. Lent*, 1 Cal. 410 (where the attachment defendant was a merchant).

1. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563.

lowed.² So injury to "credit and circumstances," as well as "bodily and mental pain and anguish," do not proximately flow from the forcible entry and unlawful detainer of real estate, and cannot be recovered in an action therefor.³ Injury to real property while its possession is wrongfully withheld does not necessarily result from the withholding of possession.⁴ And one who slanders another's title to property is not liable for damages occasioned by the unauthorized repetition of his words, by another, to an intending purchaser.⁵ Where the prompt receipt of a telegram would have given the recipient only an opportunity to contract, the actual making of the contract depending on the will of a third person, the loss of the contract, as a consequence of negligent delivery of the message, is too remote.⁶ And loss of installments of purchase money paid on a lot, because the purchaser by reason of personal injuries was unable to keep up with his payments, is too remote.⁷ One who commits a trespass by turning the cattle of another out of an inclosure on to the public lands cannot be made liable to the owner for the loss of the cattle caused by starvation for want of grass after they had been turned out of the inclosure, if the owner had been notified to take care of them.⁸ The loss of premiums or profit to an insurance company on a policy issued on the order of one who had no authority to contract for it is not proximately occasioned by the latter's misrepresentations as to his authority, since had the want of authority been known to the insurer, it does not follow that it could have found and induced a person properly authorized to accept

2. *Heyman v. Landers*, 12 Cal. 107.

3. *Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52.

4. *Warburton v. Doble*, 38 Cal. 619.

5. *Burkett v. Griffith*, 90 Cal. 532, 25 Am. St. Rep. 151, 13 L. R. A. 707, 27 Pac. 527.

6. *McQuilkin v. Postal Tel. Cable Co.*, 27 Cal. App. 698, 151 Pac. 21.

7. *De Liere v. Goldberg, Bowen & Co.*, 30 Cal. App. 612, 159 Pac. 197.

8. *Story v. Robinson*, 32 Cal. 205. See *ANIMALS*, vol. 2, p. 38.

and pay for the policy. The only proximate damage in such a case is the expense of issuing the policy.⁹ And it has been held that the destruction of a book containing a newspaper subscription list does not cause a loss of the subscriptions, and hence that the damage cannot be measured by the cost of securing them.¹⁰

§ 33. Illustrations of Proximate Damages.—Inability to take advantage of a contract for building materials, due to delay in construction caused by defendant's wrongful act, renders their subsequent increased cost a detriment proximately resulting from the delay.¹¹ And loss of construction materials due to an injunction is a proximate consequence of the restraint warranting a recovery therefor on the injunction bond.¹² Other proximate damages resulting from the commission of wrongs include such as the following: expenses incurred by barbers in moving to another location because of a trespass, loss occasioned by the abandonment of a hot-water privilege, and permanent improvements which they had made, and loss of business at the new and less favorable stand, all being items of detriment proximately caused by the trespass;¹³ loss of rents and profits directly occasioned by the wrongful withholding of possession of real property;¹⁴ loss of the use of property as measured by its rental value;¹⁵ depreciation in the value of personal property during the period of its wrongful detention from the possession of its owner;¹⁶ damage due to loss of weight of sheep, expense of other

9. *American Fire Ins. Co. v. Hart*, 141 Cal. 678, 75 Pac. 334. See *infra*, §§ 36-40, as to recovery for lost profits.

10. *Nunan v. City and County of San Francisco*, 38 Cal. 689.

11. *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406.

12. *Dougherty v. Dore*, 63 Cal. 170.

13. *Hawthorne v. Siegel*, 88 Cal.

159, 22 Am. St. Rep. 291, 25 Pac. 1114. See *infra*, §§ 36-40, as to recovery for loss of profits.

14. *Warburton v. Doble*, 38 Cal. 619.

15. *Linforth v. San Francisco G. & E. Co.*, 156 Cal. 58, 103 Pac. 320; *Meyers v. Bradford*, 36 Cal. App. Dec. 58, 201 Pac. 471.

16. *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690.

feed, and loss of troughs and tanks on leased land, following the wrongful exclusion of the animals from pasture lands;¹⁷ injuries to realty inflicted by persons whom a sheriff negligently failed to remove promptly under a writ of assistance;¹⁸ loss occasioned by the negligence of a telegraph company in delivering a message directing an attachment, whereby the debt for which the writ should have issued was lost. In such case the sender may recover the amount of the debt and is not restricted to the cost of the message.¹⁹ That a railroad conductor, discharged as a consequence of a libel communicated to his employer, could not get other work because he was beyond the age limit of employment in that line of work, has been held to be a proximate result of the libel; and the fact that the libeler did not know that railroad companies imposed an age limit on prospective employees was held to be immaterial.²⁰

§ 34. Recovery for Mental Suffering from Torts.—Mental suffering alone, unaccompanied by any other injury, will not support an action for damages.¹ And this is true, also, of mere fright.² But mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of.³ Thus it is an element of damages when occasioned by physical injuries.⁴ And mental suffer-

17. *Harrelson v. Miller & Lux, Incorporated*, 29 Cal. App. Dec. 50.

18. *Chapman v. Thornburgh*, 17 Cal. 87, 76 Am. Dec. 571.

19. *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 72 Am. Dec. 589.

20. *Adams v. Cameron*, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286.

1. *Easton v. United Trade School Con. Co.*, 173 Cal. 199, L. R. A. 1917A, 394, 159 Pac. 597; *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

2. *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440.

3. *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320. See *infra*, § 126, as to sufficiency of allegation of mental suffering.

4. *Easton v. United Trade School Con. Co.*, 173 Cal. 199, L. R. A. 1917A, 394, 159 Pac. 597; *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522; *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693.

ing, in this connection, includes fright,⁵ nervousness,⁶ grief, anxiety, worry, mortification and humiliation, as well as physical pain. These elements are not objectionable as remote, speculative, or beyond exact measurement.⁷ Mental suffering occasioned by any reasonable apprehension of future pain, disability or deformity from physical injuries, is a proper element of damages,⁸ as, also, from the contemplation of an operation made necessary by the tortious act.⁹ But apprehension occasioned by the opinions of physicians not regularly employed to treat the injuries is not the proximate result of the injury itself, and is too remote; though if the apprehension is otherwise well-grounded, the mere fact that it was based in part on such opinions, does not, it seems, preclude a recovery.¹⁰ The dread of future disability which may be compensated in damages is not confined to such injuries as cause humiliation or inspire aversion in others. Worry over threatened incapacity, such as blindness, or inability to pursue a customary vocation, is sufficient.¹¹

The rule that mental suffering alone will not sustain an action does not apply to distress attending the infliction

In an action for personal injuries, the physical and mental condition of plaintiff resulting from the accident is material, and mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from plaintiff's injury is a proper element to be considered by the jury in assessing damages. *Boa v. San Francisco-Oakland T. Rys.*, 182 Cal. 93, 187 Pac. 2; *Jones v. Key*, 36 Cal. App. Dec. 505, 202 Pac. 478.

5. *Easton v. United Trade School Con. Co.*, 173 Cal. 199, L. R. A. 1917A, 394, 159 Pac. 597.

6. *Kuhns v. Marshall*, 44 Cal. App. 588, 186 Pac. 632.

7. *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 139 Am. St. Rep. 134, 31 L. R. A. (N. S.) 559, 111 Pac. 534.

8. *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2; *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693.

9. *Townsend v. Briggs*, 3 Cal. Unrep. 803, 32 Pac. 307. See *supra*, § 22, as to recovery for future mental suffering.

10. *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2.

11. *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693.

of insult and wounding of pride, the essence of the indignity suffered being the mental distress it occasions.¹² Thus in an action for false imprisonment, damages for injured feelings and mental anguish are recoverable.¹³ But anxiety, worry and harassment, incident to a fraud perpetrated on the injured party are not.¹⁴ Not only is mental suffering resulting from physical injury an element of damages, but mental suffering, shock, fright, excitement, shame or anguish, which caused physical detriment, become thereby the basis of an action.¹⁵ The fact that the physical injury is subsequent in point of time is immaterial;¹⁶ as is also the character of the mental excitation by which the bodily injury is produced. But the causal connection must be clear, though under section 3333 of the Civil Code¹⁷ it is immaterial that the wrongdoer did not know of the injured person's peculiar susceptibility to nervous disturbance.¹⁸ It is well to remember in this connection, however, that definite nervous disturbances or disorders, caused by mental shock, excitement, and so on, are classed as physical injuries.¹⁹

§ 35. Mental Suffering from Breach of Contract.—As contradistinguished from mental suffering in cases of tort, the rule is that mental suffering from breach of contract, whether in itself, or as bringing about physical ill, cannot be compensated. In discussing the right of one wrongfully discharged from employment in a church choir to

12. *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

13. *Trabing v. California Nav. & Imp. Co.*, 6 Cal. Unrep. 696, 65 Pac. 478. See FALSE IMPRISONMENT.

14. *Newman v. Smith*, 77 Cal. 22, 18 Pac. 791.

15. *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440; *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

16. *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440.

17. See *supra*, § 31.

18. *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

19. *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440; *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

recover for injury to health, feelings or reputation, it has been said:

"The court is not allowed, under the sections quoted [Civ. Code, §§ 3300, 3301], to trace remote causes and effects, nor to examine the physical condition of plaintiff, and the causes that have brought it about, and determine how much her health has been impaired by the dismissal of her from defendant's choir, independent of her constitution, habits, or chronic condition, and thus clearly ascertain the damage to her health caused by the defendant, and estimate it in dollars. To do so would be the work of an omniscient judge. And so of the reputation and feelings. . . . No one but plaintiff experienced the mental agony and sickness of mind she complains of: She alone knows as to whether or not she has suffered such agony and mental sickness. To what extent it is mental and to what extent physical she cannot tell, because she could not in the nature of things know. The extent of the mental agony or mental sickness of each person would be different under the same precise circumstances. It would depend upon the mental peculiarities and physical condition of each person. Some kind of feeling, or emotion would be caused in anyone by his wrongful discharge from employment, or by any discharge, whether wrongful or not; but courts do not give redress in such cases, arising by mere breach of contract."²⁰

§ 36. Recovery for Loss of Profits in General.—Loss of profits, consequent upon the defendant's default or wrong, may become an element of damages in a proper case.¹ But they must be clear, proximate and their loss the natural result of the wrong, and they must be confined to the principal thing complained of and to its

20. *Westwater v. Rector etc. of Grace Church*, 140 Cal. 339, 73 Pac. 1055 (per Cooper, C.).

1. *Alden v. Mayfield*, 164 Cal. 6, 127 Pac. 45; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Shoe-maker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Meer v. Cerati*, 35 Cal. App. Dec. 631, 200 Pac. 501; *Hamer v. Ellis*, 40 Cal. App. 57, 180 Pac. 30; *Nightingale v. Scannell*, 18 Cal. 315.

naturally attendant consequences.³ And manifestly, to recover future profits as damages, it must be shown that the loss in that particular was the direct result of the act or omission of the party from whom recovery of damages therefor is sought.³ The distinction between profits which may, and those which may not, be thus considered, depends upon the directness of their connection with the contract breached. When the profits in question would have been realized from the performance of the contract itself, they are always recoverable. In such a case they are neither remote or speculative.⁴ And where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages.⁵ When, on the other hand, the profits sought to be recovered are collateral to the contract breached, as where they would have arisen out of other contracts or enterprises which might have been engaged in with the proceeds of the contract in suit, they

2. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646.

3. *Meer v. Cerati*, 35 Cal. App. Dec. 631, 200 Pac. 501.

4. *House v. Piercy*, 181 Cal. 247, 183 Pac. 807; *National etc. Mfg. Co. v. Producers' Ref. Co.*, 169 Cal. 740, 147 Pac. 963; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Fountain v. Semi-Tropic L. & W. Co.*, 99 Cal. 677, 34 Pac. 497; *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710 (quoting 8 Ruling Case Law, p. 505, with the remark

that the statement therein contained "is about as satisfactory an explanation of the philosophy of the rule as we can find in the books"); *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979; *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460.

An examination of the authorities will show that the cases in which future profits were rejected as "speculative" or "too remote" were cases where the asserted future profits were entirely collateral to the subject matter of the contract, and not consequences flowing in a direct line from the breach of such contract. *Schumann v. Karrer*, 184 Cal. 50, 192 Pac. 849.

5. *Schuman v. Karrer*, 184 Cal. 50, 192 Pac. 849.

cannot be allowed as damages.⁶ In estimating recoverable profits, the rate of profits realized on part performance of the contract may be taken as the standard for the remainder, notwithstanding the possibility that circumstances might be encountered in the future which would reduce this rate.⁷ The same distinction applies in cases of tort; that is, loss of profits occasioned directly by the injury may, in general, be compensated. Loss of profits which is collateral merely, not arising directly or by natural consequences out of the tort complained of, cannot be compensated.⁸

§ 37. Illustrations of Recoverable and Nonrecoverable Profits.—Loss of profits on a sale, due to the buyer's refusal to accept the goods sold, may be recovered by the seller.⁹ And prospective profits from the produce and increase in value of land purchased under an agreement that the plaintiff should manage, care for, and cultivate it for a share of the profits, are recoverable.¹⁰ So too are profits to be realized from the purchase, by an owner of an interest in land, of outstanding interests, with money advanced under an agreement that, after reimbursement of

6. *Palm v. Planada Development Corp.*, 175 Cal. 771, 167 Pac. 381 (attempt to recover for profits on other contracts which might have been entered into had the contractor not been waiting for work to be furnished under the contract breached); *Jost v. King*, 166 Cal. 394, 137 Pac. 4; *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710.

7. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

8. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646; *Stoddard v. Treadwell*, 26 Cal. 294. See note, 4 A. L. R. 1350, as to loss of profits as element of damages for destruction of, or injury to commercial vehicle.

9. *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020.

10. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62. See **VENDOR AND PURCHASER**.

such moneys, the parties should share in the remaining portion of the property.¹¹

But profits from possible sales which an adjacent land owner might have made at an increased valuation, had a highway been completed are too remote and speculative.¹² And damages claimed as losses of resales are too remote to be recovered in an action for the breach of a covenant against encumbrances, in the absence of a showing that the grantor of land at the time of sale knew that the grantee was buying for purposes of resale.¹³ In an action for tearing down a fence inclosing a dairy farm so that cattle came in and destroyed the grass, profits that might have been made from livestock, which the plaintiff did not have and had made no arrangements to procure, are too remote and speculative to be recovered.¹⁴ And so too profits which the lessee of a business might have made had he not surrendered the equipment to a chattel mortgagee, or if he could have procured other equipment,¹⁵ and the damages due to financial embarrassment, and loss of profits which might have been made by a corporation had it been

11. *House v. Piercy*, 181 Cal. 247, 183 Pac. 807.

And see the following instances where loss of profits were held to be recoverable: *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161 (profits which would have reasonably accrued to a fish canning company); *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637 (same case, 6 Cal. Unrep. 35, 53 Pac. 639), (profits which would have been realized from the operation of a manufacturing plant had it been constructed according to contract, or had machinery purchased been such as agreed); *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108 (profits which cannery company

would have realized on sales actually made, but which it was unable to fulfill owing to nondelivery of cans). And see cases cited *infra*, § 38.

One from whom goods have been wrongfully taken cannot recover both the value of the goods and also the profits which might have been made on their sale. *Butler v. Collins*, 12 Cal. 457.

12. *Jost v. King*, 166 Cal. 394, 137 Pac. 4.

13. *Fraser v. Bentel*, 161 Cal. 390, Ann. Cas. 1913B, 1062, 119 Pac. 509. See COVENANTS, vol. 7, p. 774.

14. *Giacomini v. Bulkeley*, 51 Cal. 260.

15. *Johnson v. Levy*, 3 Cal. App. 591, 86 Pac. 810.

organized as agreed, are too remote, speculative, and uncertain to be recovered.¹⁶

§ 38. Loss of Profits from an Established Business.—

While, ordinarily, loss of the prospective profits of a business cannot be allowed,¹⁷ the reason being that such damages are so remote, uncertain and speculative that a satisfactory estimate of the amount of the loss cannot be made,¹⁸ this rule does not apply where the business is an established one, and is wrongfully interfered with. In such a case loss of profits may be allowed.¹⁹ The fact that the business had been established but a short while,²⁰ or that absolute certainty of estimate may not be possible, makes no difference.¹ The criterion of recovery is the general profits of the business, and not the profits which might have been realized on particular goods seized or destroyed.² A manufacturing business which has been carried on for several years, at an ascertainable average daily profit, is an established business within the rule.³

16. *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

17. *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406.

And see the following cases where damages for loss of prospective profits were not allowed: *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Dexter v. Paugh*, 18 Cal. 372; *Butler v. Collins*, 12 Cal. 457; *Tobin v. Post*, 3 Cal. 373.

18. *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406 (per Shaw, J.).

19. *Western Union Tel. Co. v. Commercial Pac. Cable Co.*, 177 Cal. 577, 171 Pac. 317 (loss of profits to a telegraph company because of illegal discrimination against it by a cable company); *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406; *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161; *Hawthorne v.*

Siegel, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114; *Dwyer v. Carroll*, 86 Cal. 298, 24 Pac. 1015; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Stoddard v. Treadwell*, 26 Cal. 294 (recovery of lost profits by an employer against a negligent employee); *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 108 Pac. 885. See *infra*, § 121, as to judgment; *infra*, § 133, as to admissibility of evidence; and *infra*, § 142, as to sufficiency of evidence.

20. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327.

1. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161.

2. *Nightingale v. Scannell*, 18 Cal. 315 (where there was not sufficient data for a calculation of profits).

3. *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406.

But it has been held that damages for loss of a crop not planted is too uncertain and does not come within the rule applicable to an established business.⁴

§ 39. Loss of Commission Agent's Profits.—In general, it may be said that commissions on sales which are purely suppositive are too speculative for allowance.⁵ But there is no question that commissions on sales actually made to responsible purchasers, which the principal refused to complete by delivery, may be recovered;⁶ and the same is true of sales wrongfully made by the principal within the agent's exclusive territory,⁷ or to his exclusive customers;⁸ or lost to him because of the principal's failure to refer prospective customers to him, as agreed. Such loss is so directly connected with the principal's breach, as to preclude the objection that the damages are too remote.⁹

§ 40. Loss of Profits from Growing Crops.—Damages for loss of profits on crops which a land owner would have raised had water for irrigation been furnished him as agreed, are too remote and speculative to be allowed.¹⁰

4. *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. 562, 1058. See *infra*, § 40, as to loss of profits from growing crops.

5. *Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427.

6. *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427.

While contracts between commercial agents and their principals embody many elements of uncertainty, the damages for breach thereof are not speculative or remote, and courts award such compensation as the evidence shows with reasonable certainty the wronged party is entitled to; *Erskine v. Marchant*, 37 Cal. App. 590, 174 Pac. 74.

7. *Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139; *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460.

8. *Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139.

9. *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460.

10. *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. 366; *Crow v. San Joaquin etc. Irr. Co.*, 130 Cal. 309, 62 Pac. 562, 1058.

Damages for loss of a crop not planted are too uncertain to admit of recovery. *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406 (citing *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. 562, 1058). See *CROPS*, ante, p. 716 et seq.

Prospective profits, however, which would have been realized, as shown by the experience of previous years, from the season's growth of a perennial crop had the roots not been wrongfully destroyed, are recoverable.¹¹ And where land is leased for the purpose of growing a specific crop, the lessor to receive a portion of it as compensation for the use of the property, he may recover, for the lessee's failure to cultivate the land, the profits he would have derived from the execution of the contract, since their loss may fairly be supposed to have been within the contemplation of the parties; and in such case the lessee is not limited to the rental value of the land.¹² So, too, where crops already planted and growing are destroyed through the wrongful diversion of water from the land, damages are recoverable, for in such case the loss is direct and certain and not speculative.¹³ It cannot be said that raising a new kind of crop by irrigation on land never before irrigated, is an established business, for the loss of profits from which damages might be allowed.¹⁴

Mitigation and Reduction of Loss.

§ 41. **In General.**—The amount of damages to which a defendant has rendered himself liable by his wrongful act may sometimes be mitigated or reduced by special circumstances which show that the plaintiff's loss has not in fact been as great as the ordinary rules of damages would indicate. In certain instances, these circumstances

11. *Chan Kin Sing v. Gordon*, 171 Cal. 28, 151 Pac. 657.

12. *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710.

13. *Ellis v. Tone*, 58 Cal. 289.

To ascertain the value of growing crops by deducting from their probable maturity value the cost of production, harvesting and marketing, does not result in allowing remote or speculative damages for

their destruction. *Teller v. Bay & River Dredging Co.*, 2 Cal. App. Dec. 224. See *infra*, § 76, for the rule as to the measure of damages for growing crops.

14. *Barnes v. Berendes*, 139 Cal. 32, 72 Pac. 406. See *Starkey v. Parker*, 44 Cal. App. 215, 186 Pac. 195, as to when right accrued to make claim for damages suffered. See, generally, *CROPS*, ante, p. 717.

have become the subject of statutory enactment. Thus, special statutory provisions in regard to the mitigation of damages exist in the case of libel,¹⁵ conversion of property,¹⁶ the liability imposed by statute for flooding another's land by irrigating works,¹⁷ and the liability imposed on a sheriff for the escape or rescue of one arrested in a civil action.¹⁸ And in actions for damages for the withholding of real property, the value of permanent improvements made by the defendant is required to be deducted from the recovery, by special statute.¹⁹ It is a general principle that, though the measure of damages for injury to property is the difference in its market value before and after the injury, yet if it can be repaired for less, this circumstance will reduce the damages to the cost of repairs.²⁰ This rule applies alike to real,¹ and to personal property.² The defendant is, in fact, entitled to the standard of admeasurement most advantageous to himself.³

15. Code Civ. Proc., § 461. See LIBEL AND SLANDER.

16. Civ. Code, § 3337. See TROVER AND CONVERSION.

17. Pol. Code, §§ 3486, 3487. See WATERS.

18. Pol. Code, § 4163. See ESCAPE AND RESCUE; and, see, generally, SHERIFFS AND CONSTABLES.

19. Code Civ. Proc., § 741. See IMPROVEMENTS.

20. Rhodes v. Firestone Tire etc. Co., 34 Cal. App. Dec. 635, 197 Pac. 392; Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235.

What price an owner, who has been compelled to complete a construction contract at extra expense owing to the contractor's failure may have received for the completed work, even though it be in excess of the total cost to him, cannot, however, be shown in re-

duction of his damages. Electric Imp. Co. v. San Jose etc. R. Co., 3 Cal. Unrep. 618, 31 Pac. 455.

1. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292.

2. Rhodes v. Firestone Tire etc. Co., 34 Cal. App. Dec. 635, 197 Pac. 392; Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235.

3. Rhodes v. Firestone Tire etc. Co., 34 Cal. App. Dec. 635, 197 Pac. 392.

It seems that, in an action for damages from the destruction of growing crops, defendant would have the right to show that similar crops, similarly situated, afterwards suffered destruction or injury from other causes, thus implying that the crop in question would have met with similar mishap. Teller v. Bay & River Dredging Co., 2 Cal. App. Dec. 224.

Where the wrongful act of a defendant by which the plaintiff's property has been damaged has also resulted in incidental benefit to the plaintiff, such benefit should be deducted in reaching an estimate of damages.⁴

§ 42. For Conversion of Personal Property.—The general rule is that where one recovers property which had been wrongfully taken from him, he is considered as having received it, in mitigation of damages, and the measure of damages, in the absence of special damage, is the expense of procuring its return, with interest.⁵ But he may recover for any injury to the property during the period of the wrongful detention.⁶ The provisions of section 3336 of the Civil Code fixing the measure of damages for the conversion of personal property apply only where the property is not returned or recovered, and do not affect the rule here announced,⁷ except that expenses of pursuit may be recovered under that section.⁸ The rule applies to the case of partnership property wrongfully seized and afterwards recaptured by one of the partners, in which event its value is to be deducted from an award of damages made to the other partner.⁹ It is immaterial by what means the restoration of the property to the owner is effected, whether by purchase or otherwise.¹⁰ And it is also immaterial whether the recapture is made before or

4. *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189. But see *Corey v. Struve*, 170 Cal. 170, 149 Pac. 48, as to a mere consequential benefit in cases of wrongful conversion of property. See, generally, *TROVER AND CONVERSION*. See *infra*, § 47, as to mitigation of damages for personal injuries; and *infra*, § 130, as to necessity of pleading incidental benefit to plaintiff as mitigation.

5. *Blewett v. Miller*, 131 Cal. 149, 63 Pac. 157; *Hand v. Scodeletti*, 128 Cal. 674, 61 Pac. 373; *Nightingale*

v. Scannell, 18 Cal. 315; *Conroy v. Flint*, 5 Cal. 327. See *CLAIM AND DELIVERY*, vol. 5, p. 207.

6. *Dorsey v. Manlove*, 14 Cal. 553.

7. *Blewett v. Miller*, 131 Cal. 149, 63 Pac. 157. See *TROVER AND CONVERSION*.

8. *Lothrop v. Golden*, 6 Cal. Unrep. 284, 57 Pac. 394.

9. *Nightingale v. Scannell*, 18 Cal. 315.

10. *Blewett v. Miller*, 131 Cal. 149, 63 Pac. 157; *Nightingale v. Scannell*, 18 Cal. 315.

after the commencement of suit.¹¹ But where the property is not delivered to the owner till after verdict, the delivery is assumed to be pursuant to the verdict, and, it seems, will not relieve against damages for the detention.¹² Compensation for money or services expended on personal property wrongfully held from the owner cannot be claimed as a deduction from the amount of damages, when laid out without the owner's consent. And when the property was seized under legal process issued against another than the owner, no request for such expenditures can be presumed from the owner.¹³ The fact that nursery trees wrongfully converted and planted in his orchard by defendant afterwards died, would not affect the amount of damages for which he was liable, unless the loss was due to causes antedating the conversion, and for which he was not responsible.¹⁴

§ 43. Duty of Injured Party to Minimize Loss—In General.—It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort, to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented.¹⁵ In cases of contract, the duty is mutual.

“There is no just ground for saying that one party shall recover only compensation for his actual loss, and the other shall have his damages measured by a larger rule.”¹⁶

11. *Nightingale v. Scannell*, 18 Cal. 315.

12. *Conroy v. Flint*, 5 Cal. 327.

13. *Hisler v. Carr*, 34 Cal. 641.

14. *Asato v. Emirzian*, 177 Cal. 493, 171 Pac. 90.

15. *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 Pac. 843; *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454; *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073; *Barnes v. Berendes*, 139 Cal. 32, 72

Pac. 406; *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591; *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952; *Utter v. Chapman*, 38 Cal. 659; *Terrace Water Co. v. San Antonio etc. Co.*, 1 Cal. App. 511, 82 Pac. 562. See *infra*, § 143, as to instructions. See note, 11 A. L. R. 230, as to duty of injured person to submit to operation to reduce damages.

16. *Utter v. Chapman*, 38 Cal. 659, (per Rhodes, J.).

The measure of duty under the rule is ordinary care and diligence.¹⁷ The injured party is under no obligation to commit a trespass to save himself from harm,¹⁸ nor to assume the burden of the contract which the wrongdoer has violated,¹⁹ nor to incur relatively large expenses.²⁰ If, in thus forestalling injury, the party wronged incurs expenses which he would not otherwise have incurred, and succeeds in preventing a still greater loss, these expenses, if made in good faith, become an item of damages, which he is entitled to recover for wrong which caused the damage. But in order to have this right of recovery, the loss which he seeks to prevent must be a loss which he could have recovered as damages if it had occurred.¹ Thus, expenses incurred in the reconditioning of injured goods, whereby their value was increased beyond the expense of the process, are properly allowed as damages for the injury, the defendant having the benefit of its increased value.² And it has been held that the fact that money expended upon property in an effort to prevent increased injury, or to effect repairs, may have conferred an enhanced value upon it; will not forbid or reduce the claim for reimbursement therefor.³

§ 44. General Illustrations of Reduction of Loss.—A landlord who sues for damages arising from the tenant's repudiation of the lease can recover only the difference

17. *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 Pac. 843; *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

18. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319.

19. *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 Pac. 843.

20. *Chambers v. Belmore Land etc. Co.*, 33 Cal. App. 78, 164 Pac. 404 (stating that the rule may be otherwise where only slight expense might have averted injury).

1. *Barnes v. Berendes*, 139 Cal.

32, 72 Pac. 406. See *infra*, § 46, as to recovery of expense incurred in seeking other employment.

2. *Olcovich v. Grand Trunk Ry. Co.*, 179 Cal. 332, 176 Pac. 459.

3. *Weissband v. City of Petaluma*, 37 Cal. App. 296, 174 Pac. 955. See *supra*, § 20, as to expenses of reducing loss constituting general damages; and *supra*, § 28, as to expenses in reduction of loss being within the contemplation of the parties.

between the rents for the repudiated term as fixed by the lease, and whatever sum he may be able to rent the premises for to others during that period.⁴ His recovery in such a case is governed by section 3300 of the Civil Code fixing the general measure of damages for breach of contract, and not by section 3302 prescribing the measure for breach of an obligation to pay money only.⁵ In the absence of an agreement of the lessor of real property to make repairs, a lessee cannot stand idly by and see the crops destroyed by his own cattle and then recover damages therefor because of the necessity for repairs.⁶ Where one whose business has been interrupted by fire is hindered in erecting a new building by a neighboring land owner, but by building a temporary structure resumes business still earlier, he cannot recover lost profits against the land owner since he himself has prevented that loss. But he may recover the expenses of prevention, including the cost of the temporary structure, of setting up his machinery in it, and of removal to the new building when completed provided such expense is less than the possible loss of profits.⁷ The owner of an orchard whose fruit-laden trees are about to break because the purchaser of the crop has failed to tie up the branches as agreed is not bound to do the work himself, but may recover for damage to the trees except such as he might prevent by ordinary care and prudence after discovering the peril.⁸ Where one wrongfully deprived of irrigating water could have obtained other water at slight expense, or could have secured the water in question by paying certain assessments, the measure of damages is only the reasonable expense which would have

4. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797; *Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep. 488, 26 Pac. 967. 12, 87 Pac. 222 (where fences were out of repair). See LANDLORD AND TENANT.

5. *Respini v. Porta*, 89 Cal. 464, 32, 72 Pac. 406. 7. *Barnes v. Berendes*, 139 Cal. 201, 16 Pac. 406.

23 Am. St. Rep. 488, 26 Pac. 967. 8. *Ash v. Soo Sing Lung*, 177

6. *Brett v. Berger*, 4 Cal. App. Cal. 356, 170 Pac. 848.

been necessary to prevent loss.⁹ Where, as to a chattel mortgagee, property has been seized wrongfully under attachment and afterwards delivered to a trustee in bankruptcy for the mortgagor, it has been held that the mortgagee is not obliged to minimize his damage by following the property into the bankruptcy proceedings and proving his claim there.¹⁰ And it seems that a defendant in an attachment suit is under no obligation to reduce his damages by giving a redelivery bond for the property, as provided by the Code of Civil Procedure.¹¹

§ 45. From Breach of Contract of Sale.—The principle that the injured party must make reasonable exertion to save himself from loss is implied in all of the statutory provisions fixing the measure of damages for breach of an executory contract of sale. Thus if the seller fails to make delivery, the statutes imply a duty on the buyer's part to buy the article in the nearest market, the excess he is thus compelled to pay being the measure of his damage.¹² And, similarly, if the buyer refuses to accept the goods, the seller must dispose of them in the nearest market, his loss in so doing being the measure of his damage.¹³ Thus, while ordinarily the measure of damages for failure to deliver an article sold is the difference between the contract and the market price,¹⁴ it is clear that when these are the same the buyer sustains no loss from the breach¹⁵ because he could buy in the general market.

9. *Henrici v. South Feather Land etc. Co.*, 177 Cal. 442, 170 Pac. 1135; *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073. See *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200 (where the trouble was with defective irrigating machinery, and reliance was placed on such machinery to protect a second year's crop of the tenants).

10. *Lackenbach v. Finn*, 26 Cal. App. 482, 147 Pac. 471.

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11. *McCarthy Co. v. Boothe*, 2 Cal. App. 170, 83 Pac. 175. See *CLAIM AND DELIVERY*, vol. 5, p. 181, as to redelivery to defendant.

12. Civ. Code, §§ 3308, 3354.

13. Civ. Code, §§ 3311, 3353. See *SALES*.

14. *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667.

15. *Los Palmas etc. Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077.

But if the article is not obtainable in the market, the buyer may recover the actual loss sustained by him through the seller's breach, whatever that may be.¹⁶ It is true the buyer is not absolutely required to make the purchase in the market. However, the fact that he could make it at a certain price is enough to fix the measure of his damage.¹⁷ If he can reduce his loss by buying in some other market, he is not restricted to the nearest market.¹⁸ And if he cannot get the precise article contracted for, which in the case of machinery means a duplicate, he is not compelled to buy something similar, or "just as good."¹⁹ As to the seller, when the buyer refuses to accept, it becomes not only his privilege but duty to resell as much of the commodity as he can to others at the best obtainable price,²⁰ the defaulting buyer being responsible for the loss.¹ But if there is no market,² or if the goods, being perishable, become a partial or total loss before a resale can be effected,³ the buyer is liable for the deterioration, or the full contract price, as the case may be. The seller's right becomes fixed at the time a resale could be made with reasonable diligence.⁴ And if the seller fails to exercise

16. *National Oil etc. Mfg. Co. v. Producers' R. Co.*, 169 Cal. 740, 147 Pac. 963; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 687; *California Canneries Co. v. Pacific Sheet Metal Works*, 144 Fed. 886 (affirmed, *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108).

17. *Fairechild etc. Co. v. Southern etc. Co.*, 158 Cal. 264, 110 Pac. 951.

18. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454.

19. *Connell v. Harron, Rickard & McCone*, 7 Cal. App. 745, 95 Pac. 916.

20. *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Tustin Fruit Assn. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693.

1. *Levis v. Royal Packing etc. Co.*, 1 Cal. App. 241, 81 Pac. 1086.

2. *Coburn v. California etc. Co.*, 144 Cal. 81, 77 Pac. 771.

3. *Griffith v. Welbanks & Co.*, 29 Cal. App. 238, 155 Pac. 120; *Foote v. San Francisco Produce Co.*, 25 Cal. App. 787, 145 Pac. 730; *Frisbie v. Rosenberg Bros. & Co.*, 11 Cal. App. 638, 105 Pac. 943.

4. *Tustin Fruit Assn. v. Earl Fruit Co.*, 6 Cal. Unrep. 37, 53 Pac. 693.

reasonable diligence, the price he might have obtained may be shown to reduce his damages.⁵

§ 46. From Breach of Contract of Employment.—It is the duty of an employee who has been wrongfully discharged before his term of service has expired, to seek other employment, and thus diminish the damages sustained by him.⁶ When he succeeds, the measure of his damage becomes the difference between what he has earned in fact, and what he would have earned under the original contract.⁷ If his actual earnings equal what he would have received under the contract, it has been held that he has sustained no damages at all beyond the expense of a tender of performance.⁸ On the other hand, if there is no claim by the employer that the employee could have obtained other employment, the presumption is that the contract price is the true measure of damages.⁹ Where the discharged employee sues before the term of his original employment has expired, the duty of minimizing loss still applies, the measure of his damages being *prima facie* the contract price, subject to reduction by the defendant's proof that similar employment can probably be obtained by the plaintiff.¹⁰ And it seems it would also apply where the employee sues a third person for wrongfully bringing about his discharge.¹¹

5. *Lund v. Lachman*, 29 Cal. App. 36, 154 Pac. 295. See *SALES*.

6. *Westwater v. Rector etc. of Grace Church*, 140 Cal. 339, 73 Pac. 1055; *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 43 Pac. 963; *Utter v. Chapman*, 38 Cal. 659. See note, 15 A. L. B. 751, as to contracts within the rule which requires one to use reasonable effort to obtain other employment in order to minimize damages from breach of contract.

7. *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac.

88; *Dunn v. Daly*, 78 Cal. 640, 21 Pac. 377; *Utter v. Chapman*, 38 Cal. 659. See *MASTER AND SERVANT*.

8. *Utter v. Chapman*, 38 Cal. 659.

9. *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44. See *infra*, § 131, as to burden of proof.

10. *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884.

11. *Adams v. Cameron*, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286.

§ 47. **From Personal Injuries.**—One who sustains personal injuries through the fault of another must exercise reasonable diligence in caring for his injuries, in preventing their aggravation, and in securing medical or surgical aid.¹² But he is bound to use no higher degree of care and diligence,¹³ and if he exercises ordinary care, the fact that the treatment given him was in fact improper would not reduce his damages,¹⁴ nor would the fact that it might have been better affect the question of his case in securing it.¹⁵ Where an injured stranger selects a physician on the recommendation of his only acquaintance in the city, ordinary care is shown in the selection. One injured by the negligence of another is not required to undergo a serious and critical operation, in order to mitigate damages, where medical opinion is conflicting as to whether the operation would effect a permanent cure.¹⁶ Under general allegations of personal injuries, it is proper to consider the permanent loss to the plaintiff from the fact that the injury rendered him less capable than before of doing the business in which he was previously engaged, and in proof of such loss, evidence is admissible as to the relative gains from the business formerly carried on and that subsequently conducted by him. If the latter were equally or more profitable, no doubt the defendant may show that fact in mitigation of damages. But in such a case no allowance should be made for the specific loss of profits that

12. *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2; *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

In an action for personal injuries, it is competent for the defendant to show, in mitigation of damages, that the plaintiff's injuries were wholly or partly the result of improper treatment by his physician. *Thorne v. California Stage Co.*, 6 Cal. 232. See *supra*, § 43, as to

duty of injured party to reduce loss if possible.

13. *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

14. *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2.

15. *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

16. *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2. See note, 11 A. L. R. 230.

may be disclosed by the evidence of the comparative gains before and after the injury.¹⁷

No circumstances of provocation, whether before or at the time of an assault, can be considered in mitigation of the actual damages sustained.¹⁸ Such matter goes only to the question of exemplary damages.¹⁹

Recovery of Interest as Damages.

§ 48. In General—Uncertain and Unliquidated Claims. All recoveries of interest do not take the guise of damages. There are many cases where interest is expressly stipulated for in the contract, or is decreed by statute as a substantial right irrespective of the defendant's default.²⁰ In these aspects it is discussed elsewhere in this work.¹ But interest may also be recovered as damages, and when this is the case its consideration falls within the scope of the present article. The Civil Code provides:

“Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.”²

Ordinarily, interest which is allowed as damages is strictly incidental to the debt, and no action therefor can

17. *Shaw v. Southern Pacific R. Co.*, 157 Cal. 240, 107 Pac. 108.

18. *Benjamin v. Walton*, 181 Cal. 115, 183 Pac. 529; *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875. See note, 16 A. L. R. 816, as to effect of provocation to mitigate punitive or exemplary damages for assault.

19. *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

20. See Civ. Code, §§ 1914–1920, and other special statutes.

1. See INTEREST.

2. Civ. Code, § 3287.

A defendant who is prevented by the express mandate of this statute from paying a claim cannot be charged with interest under this code provision. *Stimson v. Dunham, Carrigan, Hayden Co.*, 146 Cal. 281, 79 Pac. 968.

be maintained after the debt is paid, unless the right is reserved by agreement.³ But this rule does not apply where the conditions of payment are such as to prevent the assertion of the claim for interest.⁴

As the state is not liable for interest charges unless by its express consent, and as counties are political subdivisions of the state, a county cannot be charged with interest as damages for the nonpayment of a claim.⁵

Uncertain and unliquidated claims.—As a general principle, interest is not allowed on unliquidated damages, or demands the amount of which cannot be ascertained from the face of the contract but is to be settled by process of law, or by an accord between the parties.⁶ But the rule is not absolute.⁷ The reason for the denial of interest on unliquidated demands is said to be that the person liable does not know what sum he owes, and therefore cannot be in default for not paying.⁸ And hence, whenever the debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest if he neglects to pay.⁹ But as damages are defined by section 3281 of the

3. *Conner v. Bank of Bakersfield*, 183 Cal. 199, 190 Pac. 801; *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510.

4. *Conner v. Bank of Bakersfield*, 183 Cal. 199, 190 Pac. 801 (where a bank interpleaded the parties to a check to determine their rights to the fund, thus severing the principal from the claim for interest). See *infra*, § 128, as to necessity of praying for interest in complaint.

5. *Hopkins v. Contra Costa County*, 106 Cal. 566, 39 Pac. 933.

6. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190; *Brady*

v. Wilcoxson, 44 Cal. 239; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397.

7. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397. See note, 12 A. L. R. 367, as to validity and effect of anticipatory provision in contract in relation to rate of interest in the event of default.

8. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Courtney v. Standard Box Co.*, 16 Cal. App. 600, 17 Pac. 778.

9. *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510; *Meyer v. Buckley*, 22 Cal. App. 96, 133 Pac. 510.

Where the amount due is fixed, the debtor may save himself from

Civil Code to be compensation for the unlawful act or omission of another, one who has been guilty of no wrong and has never been in default cannot be charged with interest as damages.¹⁰ Nor is he obliged, to avoid responsibility for a default, to seek an accord with his creditor in order to ascertain what he owes.¹¹ And where a legal contest between persons other than the debtor intervenes, rendering it doubtful to whom he owes the debt, he is not ordinarily chargeable with interest during the litigation.¹²

§ 49. Circumstances Affecting Certainty of Amount Due.

The fact that proof of the market value of goods is required to establish the amount of a claim does not render it incapable of being made certain by calculation, so as to prevent the allowance of interest under section 3287 of the Civil Code.¹³ Nor will the proof of two market values, as of goods if uninjured, and goods as injured, do so.¹⁴ The fact that the amount due depends upon whether the plaintiff had a third or a half interest in a partnership, but is certain in either case, does not render the amount unliquidable.¹⁵ And the existence of a setoff or counterclaim does not create such an uncertainty as will prevent

interest by a tender. *Gregg v. Carey*, 4 Cal. App. 354, 88 Pac. 282. See TENDER.

10. *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811.

11. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100.

12. *Conner v. Bank of Bakersfield*, 183 Cal. 199, 190 Pac. 801 (holding that if, in view of such conflicting claims, the debtor deposits the money in court, within reach of the rightful owner, he cannot afterwards be charged with interest).

13. *Macomber v. Bigelow*, 123

Cal. 532, 56 Pac. 449; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Brazil v. Azevedo*, 32 Cal. App. 364, 162 Pac. 1049; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 266, 96 Pac. 788. See *supra*, § 48, for wording of Civ. Code, § 3287.

14. *Olcovich v. Grand Trunk Ry. Co.*, 179 Cal. 332, 176 Pac. 459.

15. *Keyes v. Nims*, 43 Cal. App. 1, 184 Pac. 695.

the allowance of interest,¹⁶ even though it be itself unliquidated.¹⁷ A dispute as to the price agreed,¹⁸ or as to the amount of work done or its cost,¹⁹ will not prevent the allowance of interest. Neither will the fact that a fixed price for goods is subject to reduction or the deduction of freight charges, the amount of which is known to the purchaser, save him from payment of interest.²⁰ Where the data necessary to determine the amount due are supplied to the debtor by an invoice or statement, he will be charged with interest for failure to pay.¹

§ 50. Computation—Time and Rate.—One who refuses to pay money due on demand, is liable for interest from the date of the demand.² So, if a pledgee as special bailee of money is not in default until demand is made for its return, interest cannot be awarded as damages until his refusal, after such demand.³ Interest is not allowable from the date of the deposit,⁴ nor does the mere accrual of the right in the pledgor or bailor to make the demand start interest running in his behalf.⁵ On the theory that the commencement of suit is equivalent to a demand, and in the

16. *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 75 Pac. 564; *McCowen v. Pew*, 18 Cal. App. 482, 123 Pac. 354.

17. *McCowen v. Pew*, 18 Cal. App. 482, 123 Pac. 354.

18. *Robinson v. American Fish etc. Co.*, 17 Cal. App. 212, 119 Pac. 388.

19. *Fairchild v. Bay Point etc. Ry. Co.*, 22 Cal. App. 328, 134 Pac. 338.

20. *Courtney v. Standard Box Co.*, 16 Cal. App. 600, 117 Pac. 778.

1. *Fairchild v. Bay Point etc. Ry. Co.*, 22 Cal. App. 328, 134 Pac. 338; *Martyn v. Western Pac. Ry. Co.*, 21 Cal. App. 589, 132 Pac. 602.

2. *Buttner v. Smith*, 4 Cal. Unrep.

627, 36 Pac. 652. See case cited *infra*.

3. *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177, 572 (deposit made to insure faithful performance of contract); *Hellman v. Merz*, 112 Cal. 661, 44 Pac. 1079 (deposit of purchase money to be returned if title proves defective); *Anderson v. Pacific Bank*, 112 Cal. 598, 53 Am. St. Rep. 228, 32 L. R. A. 479, 44 Pac. 1063; *Turner v. Reynolds*, 81 Cal. 214, 22 Pac. 546 (deposit of purchase money to be returned if title proves defective).

4. *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177, 572.

5. *Anderson v. Pacific Bank*, 112 Cal. 598, 53 Am. St. Rep. 228, 32 L. R. A. 479, 44 Pac. 1063.

absence of an express agreement as to the date when payment shall be made, interest is allowable on an account for goods sold from the time of filing the complaint.⁶ The same is true when the claim is for work and labor,⁷ or for loss of profits due to the buyer's refusal to take the goods.⁸ When it is agreed that payment shall be made for goods one year after the "average date of delivery," and this is found by the court, interest is allowable from that time.⁹ Or it may be allowed in an action for services rendered, from the day the court finds a specific sum was due the plaintiff.¹⁰ And one who, in consideration of the rescission of a contract, agrees to return money received thereunder, is liable for interest from the date of the latter agreement.¹¹ When a telegraph company is liable in a sum certain for delay in delivering a message, interest may be allowed from the date of plaintiff's presentation of his claim to the company.¹² Interest on the value of personal property may properly be allowed from the date of its wrongful taking from the owner.¹³

6. *Lane v. Turner*, 114 Cal. 396, 46 Pac. 290; *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758 (holding that the rule is the same when the action is to foreclose a lien for the price of materials); *Southern Pac. Co. v. Santa Cruz*, 26 Cal. App. 26, 145 Pac. 736; *Martyn v. Western Pac. Ry. Co.*, 21 Cal. App. 589, 132 Pac. 602; *Granger's Union v. Ashe*, 12 Cal. App. 757, 108 Pac. 533.

7. *McFadden v. Crawford*, 39 Cal. 662.

8. *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177.

9. *Ryland v. Heney*, 130 Cal. 426, 62 Pac. 616.

Interest is recoverable on the

price guaranteed by a commission agent for goods sold by him from the date of sale. *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 Pac. 519.

10. *Mix v. Miller*, 57 Cal. 356.

Interest on money advanced in consideration of the performance of services is recoverable from the date of the other party's absolute refusal to perform. *Link v. Jarvis*, 5 Cal. Unrep. 758, 33 Pac. 206.

11. *Haines v. Stilwell*, 5 Cal. Unrep. 27, 40 Pac. 332.

12. *Western Union Telegraph Co. v. Lange*, 248 Fed. 656, 160 C. C. A. 556.

13. Civ. Code, § 3336; *Schmidt v. Nunan*, 63 Cal. 371; *Dorsey v. Manlove*, 14 Cal. 553.

Rate.—Interest, when allowed as damages, must be computed at the legal rate,¹⁴ though were there no statutory rule, the usual annual rate would be allowable.¹⁵ But when a rate has been agreed on by the parties, as in the case of a loan, that rate should be allowed,¹⁶ principal and interest together making up the amount of the judgment, on which interest is then allowed at the legal rate.¹⁷

§ 51. Allowance on Contracts in General.—Generally speaking, the allowance of interest as damages for the breach of express contracts is governed by section 3287 of the Civil Code,¹⁸ while the allowance of interest on money due under implied contracts is governed by section 1917 of the Civil Code fixing the legal rate payable on loans, accounts, etc.¹⁹ The amount recoverable on a stated account is “certain or capable of being made certain by calculation,” within section 3287 of the Civil Code so as to justify the allowance of interest.²⁰ So, interest is recoverable on the price guaranteed by a commission agent for goods sold by him.¹ And on broker’s commissions due on a certain day or capable of being made certain by calculation.² When one sues a pretended agent for breach of warranty of authority, and would have been entitled to recover a fixed sum from the principal had the agent been authorized to act, he is entitled to recover interest on that sum awarded against the agent, the amount being certain or capable of being made certain by calculation.³ Money due on a mutual benefit insurance certificate is liquidated when there are sufficient funds on hand to pay

14. Lally v. Wise, 28 Cal. 539;

Heyman v. Landers, 12 Cal. 107.

15. Davis v. Greely, 1 Cal. 422.

16. Brazil v. Azevedo, 32 Cal. App. 364, 162 Pac. 1049; Guy v. Franklin, 5 Cal. 416.

17. Guy v. Franklin, 5 Cal. 416.

As to interest on judgments, see JUDGMENTS.

18. See supra, § 48.

19. McCowen v. Pew, 18 Cal. App. 482, 123 Pac. 354.

20. Fee v. McPhee Co., 31 Cal. App. 295, 160 Pac. 397.

1. Marx v. Raley & Co., 6 Cal. App. 479, 92 Pac. 519.

2. Martin v. Ede, 103 Cal. 157, 37 Pac. 199.

3. Kohlberg v. Havens, 41 Cal. App. 222, 182 Pac. 467.

the amount named, and bears interest from the day when due.⁴ And installments of rent under a lease bear interest from the date they fall due.⁵

§ 52. Contracts of Sale.—Claims for goods sold at an agreed price, or at market prices, are certain or capable of being made certain, so as to justify the allowance of interest.⁶ The case differs from one for a recovery on open accounts when the amount due can only be ascertained by an examination of the accounts and proof of their correctness.⁷ But one who furnishes goods from time to time as required, and receives payments on account, does not have an unliquidated claim open to adjudication, so as to prevent his recovery of interest.⁸ Where suit is brought on a quantum valebat, for the recovery of the reasonable value of goods sold, the amount and value of which can only be established by evidence or by an accord between the parties, and are not susceptible of ascertainment by mere computation, or reference to market values, interest cannot be recovered prior to the decision of the cause.⁹ In view of section 3357 of the Civil Code provisions that “the damages prescribed in this chapter [relating to the measure of damages for breach of contract] are exclusive of . . . interest” except when expressly provided, interest cannot be allowed on the damages recoverable for a

4. *Himmelein v. Supreme Council*, 4 Cal. Unrep. 173, 33 Pac. 1130.

5. *Chambers v. Security etc. Savings Bank*, 31 Cal. App. Dec. 399, 188 Pac. 818; *Brazil v. Azevedo*, 32 Cal. App. 364, 162 Pac. 1049.

6. *Ryland v. Heney*, 130 Cal. 426, 62 Pac. 616; *Brazil v. Azevedo*, 32 Cal. App. 364, 162 Pac. 1049; *Robinson v. American Fish etc. Co.*, 17 Cal. App. 212, 119 Pac. 388; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 266, 96 Pac. 788.

7. *Heald v. Hendy*, 89 Cal. 632,

27 Pac. 67; *Robinson v. American Fish etc. Co.*, 17 Cal. App. 212, 119 Pac. 388.

8. *Pacific Mutual Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758.

9. *Tryon v. Clinch*, 44 Cal. App. 629, 186 Pac. 1042; *Macomber v. Bigelow*, 123 Cal. 532, 56 Pac. 449; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397. See *supra*, § 50, as to time when interest begins to run.

seller's failure to deliver goods sold, as fixed by section 3308, which does not provide for interest and which is included in the chapter referred to above.¹⁰ A similar decision following the same line of reasoning has been made in the case of a buyer's refusal to accept goods sold.¹¹ However, interest is not recoverable for a buyer's refusal to accept goods which have no established or reasonably well known market value.¹² Damages for breach of a warranty of fitness in goods sold are neither certain nor capable of being made certain by calculation and hence cannot bear interest until liquidated by judgment. The fact that the amount finally awarded corresponds exactly with the purchase price does not alter the rule.¹³

§ 53. Contracts for Services.—In an action to recover the reasonable value of services performed by a plaintiff, the amount, character and value of which can only be established by evidence in court or by an accord between the parties, and which are not susceptible of ascertainment by computation or by reference to market rates, the plaintiff is not entitled to interest prior to verdict or judgment.¹⁴ The general rule in California undoubtedly is that interest is not allowed in an action of quantum meruit until judgment is rendered.¹⁵ But it has been held that interest

10. *Ellsworth v. Knowles*, 8 Cal. App. 630, 97 Pac. 690.

11. *Morrell v. San Tomas etc. Packing Co.*, 13 Cal. App. 305, 109 Pac. 632. But see *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177, holding in an action for damages for breach of a contract for sale, consisting of the difference between the contract and the market price of the thing agreed to be sold, interest was allowable on the amount of damages suffered from the date of the filing of the complaint.

12. *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853.

13. *Krasilnikoff v. Dundon*, 8 Cal. App. 406, 97 Pac. 172.

14. *Macomber v. Bigelow*, 123 Cal. 532, 56 Pac. 449; *Swinerton v. Argonaut Land & D. Co.*, 112 Cal. 375, 44 Pac. 719.

15. *Tryon v. Clinch*, 44 Cal. App. 629, 186 Pac. 1042; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397; *Merchants' Col. Agency v. Gopcevic*, 23 Cal. App. 216, 137

from the maturity of a claim is recoverable notwithstanding the value was not fixed by contract.¹⁶ And, of course, where the services have been rendered at a fixed rate, interest is allowed.¹⁷ The damages recoverable by one wrongfully discharged from employment, who sues before the stipulated term of service expires, and who is therefore entitled to recover the contract price less past and future earnings in other employment, are neither certain nor capable of being made certain by calculation before judgment, and hence interest cannot be allowed before the date of judgment.¹⁸

§ 54. Building and Construction Contracts.—Where the amount due on a building contract is so fixed by agreement that it may be made certain by calculation, interest may be allowed thereon prior to judgment.¹⁹ But in an action for labor and materials furnished under a building contract providing for periodical payments on a percentage basis as estimated by the owner, and where the claim is unliquidated, interest cannot be allowed prior to judgment.²⁰ In a case where an architect was to receive a fixed percentage on the cost of work superintended by him, according to weekly statements furnished by him to the owner showing the cost, and these statements were not disputed either at the time or in subsequent litigation, it was held that interest was properly allowed on the sums due the architect from the time they became due, as the owner was apprised, or by a simple computation could have

Pac. 609; *Meyer v. Buckley*, 22 Cal. App. 96, 133 Pac. 510; *American-Hawaiian etc. Co. v. Butler*, 17 Cal. App. 764, 121 Pac. 709; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 266, 96 Pac. 788.

16. *Mix v. Miller*, 57 Cal. 356; *Mullenary v. Burton*, 3 Cal. App. 263, 84 Pac. 159.

17. *Farnham v. California etc.*

Trust Co., 8 Cal. App. 266, 96 Pac. 788. See *supra*, § 50, as to time when interest begins to run.

18. *Seymour v. Oelrichs*, 162 Cal. 318, 122 Pac. 847.

19. *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423; *Hines v. Miller*, 126 Cal. 683, 59 Pac. 142.

20. *Steere v. Formilli*, 38 Cal. App. 194, 175 Pac. 806.

been apprised, of his liability.¹ Periodical certificates, however, issued by the architect to the owner of a building under construction as a basis for payments to the contractor, but which it is expressly stipulated shall not bind the owner, do not, however, constitute such a liquidation of the contractor's claims as to justify the allowance of interest.² Extras furnished under a building contract cannot draw interest until their amount is ascertained by judgment.³ And where a subcontractor ceases work before completion, and the value of the work is unliquidated and incapable of ascertainment until fixed by judgment, interest is unwarranted.⁴ In an action where the amount due under a railroad construction contract was ascertainable by multiplying the number of miles laid by the sum the contractor was to receive per mile, the court held that interest on the amount was properly allowed from the commencement of the action.⁵ Various kinds of damage resulting from the breach of a contract to lay water-pipes and furnish water for irrigation, on certain lands, and also for stock and family use on other premises, are neither certain nor capable of being made certain by calculation, so as to warrant allowance of interest.⁶

§ 55. Allowance for Torts in General.—The Civil Code provides that,

“In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.”⁷

1. *Meyer v. Buckley*, 22 Cal. App. 96, 133 Pac. 510.

2. *American-Hawaiian etc. Co. v. Butler*, 17 Cal. App. 764, 121 Pac. 709.

3. *Stimson v. Dunham, Carrigan, Hayden Co.*, 146 Cal. 281, 79 Pac. 968.

4. *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312.

5. *Fairchild v. Bay Point etc. Ry. Co.*, 22 Cal. App. 328, 134 Pac. 338.

6. *Ferrea v. Chabot*, 121 Cal. 233, 53 Pac. 689, 1092.

7. Civ. Code, § 3288.

Under this code provision it has been held erroneous for the court to instruct that in awarding damages for the negligent destruction of property, the jury must add interest at seven per cent per annum.⁸ Under section 3287 of the Civil Code,⁹ interest may be allowed as damages due from a telegraph company for delay in transmitting a message, when the amount is a sum certain, the company being liable for that or nothing.¹⁰ Within the code rule, damages for flooding land, washing away soil and fences and occasioning deposits of sand, are unliquidated, and interest can be allowed thereon only from the date of judgment.¹¹ But in a case involving the sale of land valuable chiefly for its timber at an agreed price per acre, in which the ascertainment of the amount to be allowed a vendee by way of rebate for the removal of timber from a portion of the land was a mere matter of calculation, it has been held that an allowance of interest was proper.¹² And in an action on an injunction bond, interest is properly allowed on attorney's fees and expenses sustained in procuring a dissolution of the injunction, where such expense is certain or capable of being made certain by calculation.¹³ The only damages which the law allows for the detention of money under its process is legal interest.¹⁴ And so it has been held that in suit on an injunction bond for detaining moneys damages should carry only legal interest, and not what the money was worth.¹⁵

8. *King v. Southern Pacific Co.*, 109 Cal. 96, 29 L. R. A. 755, 41 Pac. 786.

9. See *supra*, § 48.

10. *Western Union Tel. Co. v. Lange*, 248 Fed. 656, 160 C. C. A. 556. See *supra*, § 50, as to date from which interest begins to run.

11. *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50.

12. *McCowen v. Pew*, 18 Cal. App. 482, 123 Pac. 354.

13. *Paunter v. National Surety Co.*, 36 Cal. App. 44, 171 Pac. 803. See, however, *Hooper v. Patterson*, 3 Cal. Unrep. Cas. 811, 32 Pac. 514, holding that such damages are unliquidated and that no interest can be allowed.

14. *Heyman v. Landers*, 12 Cal. 107.

15. *Lally v. Wise*, 28 Cal. 543.

§ 56. For Wrongful Detention of Personal Property.—The Civil Code provides that for the conversion of personal property the owner may claim its value at the time of conversion, with interest, or, at his option, its highest market value between conversion and verdict, without interest.¹⁶ The ordinary measure of damages for the wrongful detention of personal property is interest¹⁷ from the time of the taking to the date of the judgment.¹⁸ But such damages are not confined to interest if the party entitled can establish that the value of the use of the property to him, of which he was deprived, exceeds the interest.¹⁹ A difference is said to exist between replevin, where the owner recovers possession and “damages for the detention,”²⁰ and trover, where interest is specified as part of the recovery by section 3336 of the Civil Code.¹ At all events, the owner of personal property wrongfully detained is not entitled to interest on its value during the detention, and also to a gross sum as damages for the detention, as this would be to allow a double recovery.² Section 3333 of the Civil Code, providing the general measure of damages for torts “except where otherwise expressly provided,” is not to be deemed concurrent with section 3336 so as to justify such a double allowance.³

16. Civ. Code, § 3336.

17. *Nahhas v. Browning*, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442; *Irwin v. McDowell*, 91 Cal. 119, 27 Pac. 601; *Kelly v. McKibben*, 54 Cal. 192, 53 Pac. 13; *Frink v. Le Roy*, 49 Cal. 313; *Hamer v. Hathaway*, 33 Cal. 117; *Dorsey v. Manlove*, 14 Cal. 553; *Phelps v. Owens*, 11 Cal. 22; *Douglass v. Kraft*, 9 Cal. 562; *Conroy v. Flint*, 5 Cal. 327; *Tucker v. Hagerty*, 37 Cal. App. 789, 174 Pac. 908; *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044. See *infra*, § 57, as to allowance in equity.

18. See CLAIM AND DELIVERY, vol. 5, p. 207.

19. See CLAIM AND DELIVERY, vol. 5, p. 208.

20. Code Civ. Proc., § 667.

1. See CLAIM AND DELIVERY, vol. 5, p. 159, where this distinction is pointed out.

2. *Nahhas v. Browning*, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442; *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684; *Frink v. Le Roy*, 49 Cal. 313; *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044.

3. *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044. See *supra*, § 50,

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§ 57. Allowance in Equity.—In equitable actions, the rule of law as to interest is generally followed, but interest is sometimes allowed by courts of equity in the exercise of a sound discretion, where it would not be recoverable at law.⁴ Interest will be allowed in equity on the value of property converted, from the date of conversion following the provisions of section 3336 of the Civil Code.⁵ Where long delay in the consummation of a contract for the purchase of land is occasioned by the grossly unreasonable claim of the vendee for a rebate for timber cut from the property, interest on the purchase money, payment of which has been thus delayed, should be allowed in equity as damages.⁶

Recovery of Counsel Fees and Expenses of Litigation.

§ 58. In General.—The expenses of litigation which are sometimes allowed as damages are, in the absence of special statute or agreement, only those incurred in a previous action, the prosecution of which has constituted the wrong for which damages are sought, or which has been necessitated by the defendant's breach of obligation. Expenses incurred in the case at bar are costs, and are an incident of the judgment, to be taxed by the clerk or the court, but cannot be given by the jury by way of damages.⁷ This applies to the expense of taking depositions.⁸ And in an action for damages for a trespass, however aggravated, the jury has no right, even in awarding exemplary damages, to include plaintiff's expenses of litigation.⁹ But expenses incurred in securing a release from a false im-

as to time when interest begins to run.

4. McCowen v. Pew, 18 Cal. App. 482, 123 Pac. 354.

5. See supra, § 48, as to the provisions of Civ. Code, § 3336; Chanslor-Canfield Midway Oil Co. v. United States, 266 Pa. 145.

6. McCowen v. Pew, 18 Cal. App. 482, 123 Pac. 354.

7. Shay v. Tuolumne Water Co., 6 Cal. 286. See Costs, vol. 7, p. 250.

8. W. & P. Nicholls v. Mapes, 1 Cal. App. 349, 82 Pac. 265.

9. Falk v. Waterman, 49 Cal. 224; Howell v. Scroggins, 48 Cal. 355.

See "Exclusion,"
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prisonment;¹⁰ or in defending an action maliciously prosecuted,¹¹ or by a covenantee in defending a suit by the holder of a paramount title,¹² or in securing the dissolution of a temporary injunction,¹³ are subsequently recoverable. Where counsel fees and other expenses of litigation are recoverable as damages, only reasonable expenditures can be allowed; never extravagant and unnecessary fees and expenses.¹⁴

§ 59. Expense in Pursuit of Personal Property.—The Civil Code, in prescribing the measure of damages for the conversion of personal property, includes as an element of damages “a fair compensation for the time and money properly expended in pursuit of the property.”¹⁵ It was formerly held that such expenses, while recoverable where the action was for conversion, could not be recovered where it was in form one of claim and delivery, the statute governing the recovery in such cases¹⁶ not embracing the expenses of pursuit.¹⁷ But this earlier rule was later disapproved, the supreme court holding that if the expenses of pursuit were properly alleged as damages the form of action was immaterial. It is only where such elements are not pleaded that they are not recoverable.¹⁸

10. *Nevas v. Costa*, 5 Cal. App. 111, 89 Pac. 860. See FALSE IMPRISONMENT.

11. *Stevens v. Chisholm*, 179 Cal. 557, 178 Pac. 128.

12. *Levitzky v. Canning*, 33 Cal. 299.

13. *Ah Thae v. Quan War*, 3 Cal. 216 (recovery in action on the injunction bond). See INJUNCTION.

14. *Stevens v. Chisholm*, 179 Cal. 557, 178 Pac. 128; *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106. See *infra*,

§ 128, as to necessity of pleading that expenses were reasonable.

15. Civ. Code, § 3336.

16. Code Civ. Proc., § 667.

17. *Redington v. Nunan*, 60 Cal. 632; *Kelly v. McKibben*, 54 Cal. 192.

18. *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656. See *supra*, § 42, as to return of property operating to mitigate damages; *infra*, § 63, as to allowance of attorney's fees; *infra*, § 131, as to burden of proving that expenses were properly incurred. See CLAIM AND DELIVERY, vol. 5, p. 209.

§ 60. Allowance of Counsel Fees in General.—The general rule is that counsel fees are not recoverable in actions either at law or in equity, except where expressly allowed by statute.¹⁹

“It is contrary to the general policy of the law that a plaintiff who is unsuccessful in his suit shall be mulcted in damages merely by reason of his failure to obtain a judgment. It is only in exceptional cases that the successful party in an action, either at law or in equity, is permitted to recover as a part of his damages the attorneys’ fees paid by him.”²⁰

For a short time the law of California allowed certain attorneys’ fees to the prevailing party in an action; but that provision was repealed in 1855.¹ And since then “the measure and mode of compensation of attorneys and counselors at law is [are] left to the agreement, express or implied, of the parties,” as declared by section 1021 of the Code of Civil Procedure.² Thus in the absence of a contractual stipulation therefor, and of special statute, counsel fees cannot be recovered for breaches of contract, as in the foreclosure of a mortgage, or other lien.³ Nor can counsel fees be awarded in excess of the sum stipulated therefor in the contract.⁴ Attorney’s fees are allowed by special statute as damages against a railroad for refusing to sell a ticket,⁵ against the co-owner of a ditch or flume who fails to contribute to its

19. *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485; *Salmino v. Juri*, 96 Cal. 418, 31 Pac. 365; *Williams v. MacDougall*, 39 Cal. 80; *Spooner v. Cady*, 5 Cal. Unrep. 357, 44 Pac. 1018.

20. *Black v. Hilliker*, 130 Cal. 190, 62 Pac. 481.

1. Stats. 1855, p. 250.

2. *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485.

3. *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117; *Clemens v. Luce*, 101 Cal.

432, 35 Pac. 1032; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Sichel v. Carrillo*, 42 Cal. 493. See *NEGOTIABLE INSTRUMENTS*; *MECHANICS’ LIENS*; *MORTGAGES*; and other specific titles as to recovery of attorneys’ fees in enforcement of particular contracts.

4. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Mascarel v. Raffour*, 51 Cal. 242.

5. Civ. Code, § 490. See *CARRIERS*, vol. 4, p. 913.

upkeep,⁶ on abandonment of condemnation proceedings,⁷ and on certain bonds given in such proceedings,⁸ in actions for wages in justices' courts,⁹ in an unsuccessful action by an executor or administrator against the estate,¹⁰ in mortgage foreclosures,¹¹ when foreclosure of a mortgage or lien is sought against an estate,¹² and on a bond given to secure the dissolution of an injunction restraining the diversion of waters.¹³

§ 61. Allowance in Equity.—Notwithstanding the general rule against the allowance of counsel fees in equity,¹⁴ it has been observed that cases may arise in which a court of equity will award counsel fees as a part of the relief granted, and without which the relief would be nugatory. For example, in the case of a series of acts to be performed at short intervals, through a long period of time, if the party charged with the obligation should contumaciously refuse on each successive occasion to perform the required act, and thereby impose on the opposite party the necessity, on each separate occasion, of employing counsel to compel a performance, a court of equity may award counsel fees as a part of the costs, not only with a view to the contumacy of the party in default, but for the further reason that otherwise the relief granted might be wholly ineffectual.¹⁵ The allowance sometimes made in equity of counsel fees out of a fund held by trustees or in which all litigants have a common interest, is not an allow-

6. Civ. Code, § 843. See **WATERS.**

7. Code Civ. Proc., § 1255a.

8. Code Civ. Proc., § 1251. See **EMINENT DOMAIN.**

9. Code Civ. Proc., § 924. See **MASTER AND SERVANT.**

10. Code Civ. Proc., § 1510. See **EXECUTORS AND ADMINISTRATORS.**

11. Code Civ. Proc. § 726; Stats. 1873-74, p. 707. See **MORTGAGES.**

12. Code Civ. Proc., § 1500. See **EXECUTORS AND ADMINISTRATORS.**

13. Code Civ. Proc., § 532. See **INJUNCTION.** See *supra*, § 17, as to necessity that counsel fees shall have been paid; *supra*, § 21, as to counsel fees as constituting special damages; and *supra*, § 58, as to necessity that counsel fees be reasonable.

14. See *supra*, § 60.

15. *Williams v. MacDougall*, 39 Cal. 80.

ance to a prevailing party, and consequently cannot be viewed as damages.¹⁶

§ 62. General Illustrations of Allowance of Counsel Fees.

Attorney's fees incurred in securing a release from false imprisonment are recoverable,¹⁷ and so are fees paid counsel by a covenantee to defend a suit by the holder of a paramount title. The case is the same when the covenantor brings the action against the covenantee, thus working a breach of covenant.¹⁸ In a case where a building contract, secured by a bond, binds the contractor to deliver the building free from mechanics' liens, the bond is liable for attorney's fees expended by the owner in freeing the property from such liens.¹⁹ In general, one suing for a trespass is not entitled to attorney's fees.²⁰ And where a lessee sues his landlord for having been wrongfully excluded from the premises, he is not entitled to recover as damages the fee of an attorney whom he consulted.¹

§ 63. For Detention or Conversion of Personal Property.

Though the question remained debatable for some time in California, the rule is now well settled that attorney's fees are not recoverable either for the wrongful detention or the conversion of personal property, whether the action is one of claim and delivery or trover.² The fact that the

16. See *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485, and *Salmino v. Juri*, 96 Cal. 418, 31 Pac. 365, for instances of the distinction.

17. *Neves v. Costa*, 5 Cal. App. 111, 89 Pac. 860. See FALSE IMPRISONMENT.

18. *McCormick v. Marcy*, 165 Cal. 836. See COVENANTS, vol. 7, p. 777.

19. *Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009; *Tally v. Ganahl*, 151 Cal. 418, 90 Pac. 1049. See *infra*, § 119, as to ques-

tions for the jury; *infra*, § 126 et seq., as to pleading damages; and *infra*, § 133, as to admissibility of papers in case in which attorney's services were rendered.

20. *Falk v. Waterman*, 49 Cal. 224; *Howell v. Scoggins*, 48 Cal. 355.

1. *Scurich v. Ryan*, 14 Cal. App. 750, 113 Pac. 123.

2. See CLAIM AND DELIVERY, vol. 5, p. 210; and see TROVER AND CONVERSION.

fees have been paid makes no difference.³ This means that section 667 of the Code of Civil Procedure allowing "damages for the detention" in claim and delivery, does not include attorney's fees,⁴ and also that the clause of section 3336 of the Civil Code allowing expenses of pursuit to the owner recovering for a conversion, does not embrace them.⁵ And neither statute applies to a case of claim and delivery when the defendant secures a return of the property by giving a redelivery bond, and is put to no expense, save for attorney's fees expended, in defending the action.⁶ Attorney's fees expended by a bank in recovering money it had been deceived into paying out on a fraudulent telegraph order are not recoverable from the persons liable for the fraud but who never had possession of the money, under section 3336 of the Civil Code, the action being in fact one for damages for the fraud, and not for conversion of the money.⁷

§ 64. On Bonds Given in Judicial Proceedings.—It has been said that the allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional, and it should not be carried beyond the point to which former decisions have taken it.⁸ In a very early case it was held that in an action for damages on an attachment bond counsel fees paid out in defending the attachment suit constituted no part of the dam-

3. *W. R. Bradshaw & Co. v. Eggers*, 27 Cal. App. 132, 148 Pac. 961.

4. *Harris v. Smith*, 132 Cal. 316, 64 Pac. 409.

5. *McDonald v. McConkey*, 57 Cal. 325; *W. & P. Nicholls v. Mapes*, 1 Cal. App. 349, 82 Pac. 265. And see *Spooner v. Cady*, 5 Cal. Unrep. 357, 44 Pac. 1018, holding that a note given for attorneys' fees is not the measure of the expenses of pursuit under Civ. Code, § 3336.

6. *Black v. Hilliker*, 130 Cal. 190, 62 Pac. 481.

7. *Pacific Postal Tel. Cable Co. v. Bank of Palo Alto*, 109 Fed. 369, 54 L. R. A. 711, 48 C. C. A. 413 (reversing *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.*, 103 Fed. 841). See *supra*, § 17, as to necessity that counsel fees shall have been paid.

8. *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833 (per *McFarland, J.*). See *INJUNCTION*.

ages.⁹ But this decision was later disapproved.¹⁰ And it is now the established rule that counsel fees paid out to dissolve an injunction are a proper element of damages to be recovered in a suit on the injunction bond.¹¹ But the fees recoverable are only those paid out specifically for effecting a dissolution of the temporary injunction,¹² or restraining order; and not merely to resisting a preliminary injunction.¹³ This is still true, though no effort was made to dissolve the temporary injunction, but the entire case was defeated on final hearing on precisely the same issues that would have been tried on a motion to dissolve.¹⁴ So fees for services rendered after the dissolution of the temporary injunction,¹⁵ or after it has been made perpetual,¹⁶ cannot be recovered.¹⁷

9. *Heath v. Lent*, 1 Cal. 410.

10. *Elder v. Kutner*, 97 Cal. 493, 32 Pac. 563; *Prader v. Grim*, 13 Cal. 586; *Ah Thaie v. Quan War*, 3 Cal. 216. See ATTACHMENT, vol. 3, p. 556.

11. *Porter v. Hopkins*, 63 Cal. 53 (holding that this includes fees paid to prosecute an appeal from an order of the lower court refusing to dissolve the injunction); *Prader v. Grim*, 13 Cal. 585; *Heyman v. Landers*, 12 Cal. 107; *Summers v. Farish*, 10 Cal. 347; *Ah Thaie v. Quan War*, 3 Cal. 216.

On a bond given by an execution creditor to a sheriff to indemnify him against the claim of a third person to the property levied on, the sheriff, having sold the property and in consequence had judgment rendered against him at suit of the claimant, may recover counsel fees paid out in defending

the latter suit. *Graves v. Moore*, 58 Cal. 435.

12. *Black v. Hilliker*, 130 Cal. 190, 62 Pac. 481; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833; *Bustamente v. Stewart*, 55 Cal. 115.

13. *Warden v. Choate*, 33 Cal. App. 354, 165 Pac. 36. See *supra*, § 60, as to statute allowing recovery of attorneys' fees on bond given to secure dissolution of an injunction restraining diversion of waters.

14. *San Diego W. Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, 35 Pac. 651.

15. *Porter v. Hopkins*, 63 Cal. 53.

16. *Webber v. Wilcox*, 45 Cal. 301.

17. See, also, *supra*, § 17, as to necessity that counsel fees shall have been paid.

IV. MEASURE OF DAMAGES.

For Injuries to the Person.

§ 65. **General Rule.**—Damages in personal injury cases are not liquidated. No fixed amount may be recovered, no exact proof of any fixed amount can, from the nature of the case and of the elements which enter into the award, ever be made.¹⁸ There is no standard by which the value of an eye, or of an ear, or of a limb can be computed, or which will determine the amount of money which will compensate a person for the loss or impairment of one of his senses.¹⁹ Hence in actions for personal torts the law does not attempt to fix any precise rules for the measurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury.²⁰ This is so, although section 3333 of the Civil Code prescribes as the measure of damages for torts “the amount which will compensate for all the detriment proximately caused thereby, whether it could

18. *Du Val v. Boos Bros. Cafeteria Co.*, 45 Cal. App. 377, 187 Pac. 767; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513.

19. *Clare v. Sacramento Elec. etc. Co.*, 122 Cal. 504, 55 Pac. 326.

20. *Grant v. Los Angeles Transfer Co.*, 45 Cal. App. 731, 188 Pac. 294; *Brinck v. Bradbury*, 179 Cal. 376, 176 Pac. 690; *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Kimie v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 104 Pac. 312; *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997; *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118, 35 Pac. 572; *Wheaton v. North Beach & M. R. R. Co.*, 36 Cal. 590; *Aldrich v. Palmer*, 24 Cal. 513; *Fernald v. Eaton & Smith*, 40 Cal. App. 498, 180 Pac. 944; *Riffel v. Letts*, 31 Cal. App.

426, 160 Pac. 845; *Earl v. San Francisco Bridge Co.*, 31 Cal. App. 339, 160 Pac. 570; *Scrogg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082; *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591; *Trabing v. California Nav. & Imp. Co.*, 6 Cal. Unrep. 696, 65 Pac. 478; *Townsend v. Briggs*, 3 Cal. Unrep. 803, 32 Pac. 307. See *infra*, § 119, as to cause and extent of personal injuries being a question for the jury; and *infra*, § 142, as to sufficiency of evidence.

Wanton or malicious motives in the defendant were held in an early case to render the assessment of damages peculiarly a question for the jury.

have been anticipated or not,"¹ and though section 3283 allows recovery for detriment resulting after the commencement of the action, or certain to result in the future.² The jury's assessment is subject to the wide discretion vested in the trial court to set it aside, where it deems the award unfair.³

§ 66. Method of Assessment.—In reaching an assessment of damages for personal injuries, the rule is that the jury must take into consideration all the elements of damage shown by the proofs, and apply their best and honest judgment to ascertain what, under all the evidence, will be just compensatory relief.⁴ It is proper in estimating such damages to take into account plaintiff's life expectancy, and also to make use of the methods of arriving at a proper measure of damages adopted under the Workmen's Compensation Act.⁵ But it is improper for the jury to measure the damage from the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what the plaintiff has suffered and must continue to suffer.⁶ It has also been held that the jury cannot, in estimating damages, consider the fact that the plaintiff is dependent upon manual labor for a living.⁷

1. *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591.

2. *Rystinki v. Central California T. Co.*, 175 Cal. 336, 165 Pac. 952. See *supra*, § 22, as to recovery of future damages.

3. *Brinck v. Bradbury*, 179 Cal. 376, 176 Pac. 690; *Earl v. San Francisco Bridge Co.*, 31 Cal. App. 339, 160 Pac. 570.

There is no inflexible or definite rule by which courts can be governed in reviewing verdicts awarding damages to credit, reputation and feelings. *Kinsey v. Wallace*, 36 Cal. 462. See note, 3 A. L. R. 610, 10 A. L. R. 179, as

to increase in cost of living as affecting damages for personal injuries or death.

4. *Seragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706.

The jury must consider all the circumstances attending the occurrence of the injury. *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Fernald v. Eaton & Smith*, 40 Cal. App. 498, 180 Pac. 944.

5. *Hansen v. Sierra etc. Power Co.*, 32 Cal. App. 333, 162 Pac. 924.

6. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513.

7. *Shea v. Potrero & B. V. R. R. Co.*, 44 Cal. 414. See *infra*, § 134,

§ 67. Elements of Compensation in General.—The leading object of actions for personal injuries is to obtain reasonable and just compensation, comprehending both the present and the future.⁸ And where the amount awarded is but a poor recompense for the physical detriment, and for the pain already endured, a contention that the jury were improperly allowed to consider future mental suffering will not be allowed to effect a reversal of the judgment.⁹ Physical pain, mental suffering, and impairment of earning capacity are all elements to be considered in assessing damages for personal injuries.¹⁰ But for none of them does there exist any precise measure of damages.¹¹ Expenses necessarily incurred in the care and cure of the injured person are also recoverable.¹²

§ 68. Pain and Disability.—In a personal injury case damages may be given for the detriment to the health and physical capacity of the plaintiff, for physical suffering, and for the permanence of the injury.¹³ And also for mental suffering, as well as for pain of body.¹⁴ The

as to the evidence of the financial condition of the parties.

8. *Aldrich v. Palmer*, 24 Cal. 513; *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082.

9. *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693. See *infra*, § 22, as to recovery of future damages.

10. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197. See *infra*, § 68, as to physical and mental suffering; *infra*, § 69, as to loss of earning capacity; and *infra*, § 126, as to necessity of alleging each item of physical detriment.

11. *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197.

12. See *infra*, § 70.

13. *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 70 Pac. 624 (stating the liability of one who commits an assault and battery or other unlawful violence to the person of another); *Malone v. Hawley*, 46 Cal. 409.

14. *Malone v. Hawley*, 46 Cal. 409; *Fairchild v. California Stage Co.*, 13 Cal. 599. And see cases cited *infra*. See *supra*, § 34, as to recovery for mental suffering attending or causing physical injuries; *infra*, § 126, as to sufficiency of allegations of mental suffering; *infra*, § 135, as to evidence of physical and mental suffering; and

recovery for physical and mental suffering, however, is allowed only where the victim is himself the plaintiff, and not where recovery is sought by one in a representative capacity.¹⁵ An injury from the permanent disfigurement of a minor child is an item properly allowable in the child's own action for damages, but not in an action by the parent.¹⁶ The physical condition of the plaintiff at all times resulting from his injuries is a proper subject of inquiry in ascertaining actual damages.¹⁷

§ 69. Loss of Time and Impairment of Earning Capacity.—One who has sustained physical injuries through the wrong of another is entitled to recover the value of his time during which he is disabled.¹⁸ The value of one's time is the equivalent of his power to earn money, and ordinarily means nothing more. But the ability and practice of caring for one's self, gives a value to one's time, and if he is made helpless by another's wrong, he is entitled to compensation for the value of the time he can no longer employ in his own service.¹⁹ Earning capacity, prior to sustaining personal injuries, in the business customarily followed, is a proper element to be considered in assessing damages.²⁰ It is the loss, through impairment of earning capacity, to the person injured

infra, § 142, as to sufficiency of evidence.

15. *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693.

16. *Karr v. Parks*, 44 Cal. 46.

17. *Dow v. City of Oróville*, 22 Cal. App. 215, 134 Pac. 197. See supra, § 67, as to consideration of future mental suffering.

Inability to pursue musical studies for which plaintiff, a young lad, possesses peculiar talent, is a proper item to be considered by a jury in assessing damages for personal injuries. *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325.

18. *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106; *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72; *Malone v. Hawley*, 46 Cal. 409; *Graeber v. Derwin*, 43 Cal. 495. See note, 9 A. L. R. 510, as to measure of damages for loss of earning capacity of person engaged in business for himself.

19. *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 741, 90 Pac. 125.

20. *Ehat v. Scheidt*, 17 Cal. App. 430, 120 Pac. 49.

that is to be ascertained, if possible, and not the loss which an average man would sustain from a similar injury. The standard of an average man is resorted to only where the specific evidence as to the actual loss to the particular man is wanting and where experience teaches that there will be some loss from the injury.¹ Compensation for personal injuries is not dependent upon the cutting off or diminution of wages by reason of the injury, nor is the amount thereof measured by the amount of income or wages lost.² It is earning capacity, rather than actual earnings, that forms the basis of estimate. There must be some showing of impairment of earning capacity in order to warrant a recovery on that account, but this showing need not include proof of the actual receipt of wages, or even capacity to earn a specific sum in any particular employment. From the nature of the case the amount of recovery must be left to the wise discretion of the jury. But if damages are claimed for inability to pursue some calling of special skill, such as the practice of a profession, the rule might be more strict.³

As a general rule, loss of profits of a business in which plaintiff is an owner and which involves the use of capital and hired help, is not an element of damages for personal injuries, the limit of recovery being the worth of plaintiff's services in the conduct of the business.⁴ It seems, however, that he may show the character and extent of the business in which he was engaged prior to the injury, together with the resulting incapacity, so as to enable the jury to arrive at a proper estimate of damages.⁵

1. *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108.

2. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72; *Clare v. Sacramento Elec. etc. Co.*, 122 Cal. 504, 55 Pac. 326; *Seragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706.

3. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72.

4. *Lombardi v. California St. Ry. Co.*, 124 Cal. 311, 57 Pac. 66. See *supra*, §§ 36-38, as to recovery for loss of profits in general.

5. *Shea v. Potrero & B. V. R. R. Co.*, 44 Cal. 414. See *infra*, § 126,

§ 70. Expenses of Care and Treatment.—The expense to which an injured person will probably be put in hiring someone to care for him because of his injuries, is a proper item of damages.⁶ Sums paid out for board during disability following personal injuries cannot be recovered, where the expense of living has not been augmented by the injury. To allow them in addition to an allowance for loss of time would result in a double recovery.⁷ But where the expense of living has been increased, the excess is properly allowed as damages, in addition to loss of time.⁸ The expenses of treatment and care are also recoverable in an action for personal injuries.⁹ The correct measure of damages for medical and hospital treatment, drugs, etc., incurred because of personal injuries, is their reasonable value, rather than the amounts actually paid for them.¹⁰ It has been held that a parent suing in his own behalf for injuries to his minor child can recover for such expenses as he incurred in healing the original wound, but not for the expense of removing blemishes or disfigurements.¹¹

For Injuries to Property.

§ 71. General Rule of Damages for Torts.—The Civil Code prescribes as follows:

“For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will

as to allegations of loss of earning power.

6. *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 741, 90 Pac. 125.

7. *Graeber v. Derwin*, 43 Cal. 495.

8. *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528.

9. *Graeber v. Derwin*, 43 Cal. 495; *Ehat v. Scheidt*, 17 Cal. App. 430, 120 Pac. 49. See *supra*, §§ 43, 47, as

to duty of injured party to reduce his damage, by securing medical treatment.

10. *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522; *Townsend v. Keith*, 34 Cal. App. 564, 168 Pac. 402. See *supra*, § 17, as to necessity of payment of medical expenses.

11. *Karr v. Parks*, 44 Cal. 46.

compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."¹²

The measure of damages thus fixed for torts is said to be substantially the same as that declared for breaches of contract by section 3300 of the Civil Code.¹³ But a difference exists between the measure of damages for torts laid down by section 3333 of the Civil Code, and the provisions of section 3294 of the same code, prescribing the grounds for exemplary damages, and this distinction is due to the presence or absence of oppression, fraud or malice as the case may be.¹⁴ Special statutory provisions fix the measure of damages for many specific torts, as for the wrongful detention of personal property,¹⁵ for the conversion of personal property,¹⁶ for breach of trust,¹⁷ for the wrongful occupation of real property¹⁸ and for wrongfully holding over,¹⁹ for seduction,²⁰ for wrongfully causing death,¹ and for dueling.²

§ 72. Loss of or Injury to Personal Property.—Under section 3333 of the Civil Code,³ the measure of damages for

12. Civ. Code, § 3333. See particular subjects considered elsewhere in this work, such as ASSAULT AND BATTERY, vol. 3, pp. 190-193; ATTACHMENT, vol. 3, p. 555 et seq.; FRAUD; MINES AND MINERALS; NEGLIGENCE; TRESPASS; and other specific heads cited infra this section. See supra, § 15, as to necessity of loss and of causal relation between injury and detriment. See supra, § 34, as to recovery for mental suffering in cases of tort. See supra, §§ 36-40, as to recovery for loss of profits.

13. *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939. But see supra, § 31, as to the difference of causal connection between wrong and damage, in case of breach of contract and of tort.

14. *Maher v. Wilson*, 139 Cal. 514,

73 Pac. 418. See infra, § 106 et seq. as to exemplary damages.

15. Code Civ. Proc., § 667. See CLAIM AND DELIVERY, vol. 5, p. 206 et seq.

16. Civ. Code, §§ 3336-3338. See TROVER AND CONVERSION. See supra, § 42, as to mitigation of damages for conversion of personal property.

17. Civ. Code, §§ 2237, 2238. See TRUSTS.

18. Civ. Code, § 3334. See EJECTMENT.

19. Civ. Code, § 3335. See FORGIBLE ENTRY AND DETAINER.

20. Civ. Code, § 3339. See SEDUCTION.

1. Code Civ. Proc., § 377. See DEATH.

2. Civ. Code, §§ 3347, 3348.

3. See supra, § 71.

the destruction of personal property is the value of the property destroyed.⁴ Its cost is not the standard,⁵ nor is money expended in replacing it.⁶ The detriment caused by the injury or partial destruction of personal property is the difference in value immediately before and after the injury, provided that if repairs can be effected for a smaller sum, that sum becomes the limit of recovery.⁷ Where property of the same nature belonging to different owners is damaged by negligent handling, and afterwards by consent of the parties commingled, the measure of damages to each owner of an undivided share is his proportion of the aggregate damage to the commingled mass.⁸ Where property sued for is a chose in action, as a bill, note, or other security for the payment of money, the measure of damages is *prima facie* the amount due on the security; the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security.⁹ And where a mortgage debt has been lost by the negligence of the notary in taking the acknowledgment, the measure of damages is the amount of the debt and interest which the mortgage was intended to secure.¹⁰ But damages for the destruction of a book containing a newspaper subscription list must be limited to the value of the book, unless special damage is alleged.¹¹

4. *Sickles v. Mt. Whitney Power & Elec. Co.*, 177 Cal. 278, 170 Pac. 599; *Nunan v. City and County of San Francisco*, 38 Cal. 689. See *infra*, § 79, as to the concept of value.

5. *Nunan v. City and County of San Francisco*, 38 Cal. 689.

6. *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

7. *Rhodes v. Firestone Tire etc. Co.*, 34 Cal. App. Dec. 635, 197 Pac. 392; *Kincaid v. Dunn*, 26 Cal. App. 686, 148 Pac. 235. See *supra*, § 41, as to mitigation of damages for in-

jury to property by showing cost of repairs; and *infra*, § 131, as to burden of proof.

8. *Arnold v. Producers' Fruit Co.*, 128 Cal. 637, 61 Pac. 283.

9. *Zeigler v. Wells, Fargo & Co.*, 23 Cal. 179, 83 Am. Dec. 87. See *infra*, § 80, as to value of choses in action as declared by statute.

10. *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714. See *ACKNOWLEDGMENTS*, vol. 1, p. 300.

11. *Nunan v. City and County of San Francisco*, 38 Cal. 689; *Over-*

§ 73. Injury to Real Property in General.—As a general rule, the measure of damages for injury to real property is the difference in its market value before and after the injury.¹² But this rule is not invariably applied. Thus, where land is injured by being gullied and washed away, the cost of putting it in repair may properly be considered as furnishing the measure of damages.¹³ But if the cost of repairs will exceed the actual injury, it cannot furnish the measure of recovery.¹⁴ Where a small portion of a tract of land is destroyed, the owner may, if he choose, recover the value of the part destroyed, that being the least he is entitled to, rather than for the diminution in value of the entire tract.¹⁵ And in trespass for disturbing the bed of a turnpike road, by building a railroad thereon, the measure of damages is the damage actually resulting from the defendant's acts, and not the entire value of the land composing the bed of the road.¹⁶ Rental value is not the measure of damages, which must represent actual compensation.¹⁷ Where land available only for placer mining purposes is injured by causing deposits of boulders and gravel to be placed on it, the measure of damages, in case the cost of removing the debris is less than the value of the property prior to the injury would be such cost; but if the cost of removal would exceed the value prior to the injury, then the value affords the measure. Where the land is available both for mining and agriculture, but has a greater value for mining, the same rule applies. But if its value is greater for agriculture, the evidence show-

street v. Merritt, 186 Cal. 494, 200 Pac. 11.

12. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50 (applying the measure to damage caused by flooding of the property); Cox v. Odell, 1 Cal. App. 682, 82 Pac. 1086.

13. Cox v. Odell, 1 Cal. App. 682, 82 Pac. 1086.

14. Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292;

De Costa v. Massachusetts Mining Co., 17 Cal. 613 (cost of filling up a ditch).

15. Gordon v. Perkins, 36 Cal. App. 90, 171 Pac. 698.

16. Stockton & L. Gravel Road Co. v. Stockton & C. B. R. Co., 53 Cal. 11.

17. Barr v. Branstetter, 42 Cal. App. 725, 184 Pac. 409.

ing that it was wholly destroyed for such purpose, its value for that purpose would become the measure of damages. Where the use of land for agricultural purposes is absolutely incompatible with its working as a placer mine, the amount of damages for injury to it rendering it useless for agriculture and much more difficult for mining, is to be determined upon the basis of the availability of the land for the most valuable use to which it could be put, but not on its availability for both uses.¹⁸ The measure of damages for the destruction of an alfalfa field, through the wrongful refusal to furnish irrigating water, is the cost of reseeded the field, plus the loss of profits which would have been realized from the alfalfa stand had it been properly irrigated during the time water was refused. The case is said to be practically the same as the destruction of a meadow, where the measure of damages would be the cost of restoration plus the rental value till restored.¹⁹

§ 74. Buildings, Fixtures and Extraction of Raw Materials.—The measure of damages for a tortious injury to a building is the cost of repairing or restoring it to its former condition, when that may be done at reasonable cost, coupled with an allowance for the loss of rentals during the period required to make the repairs.²⁰ This rule is in accord with section 3333 of the Civil Code.¹ Whether the owner in fact makes the repairs is immaterial.² Under section 3333 of the Civil Code, the measure of damages for wrongfully removing a fixture from the realty is the value of the article as it was in place as a

18. *Salstrom v. Orleans Bar Gold Min. Co.*, 153 Cal. 551, 96 Pac. 292.

19. *Lowe v. Yolo County etc. Water Co.*, 157 Cal. 503.

20. *Higgins v. Los Angeles Gas & Electric Co.*, 159 Cal. 651, 34 L. R. A. (N. S.) 717, 115 Pac. 313; *Linforth v. San Francisco Gas*

& Electric Co., 156 Cal. 58, 19 Ann. Cas. 1230, 103 Pac. 320.

1. *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 19 Ann. Cas. 1230, 103 Pac. 320.

2. *Higgins v. Los Angeles Gas & Electric Co.*, 159 Cal. 651, 34 L. R. A. (N. S.) 717, 115 Pac. 313.

part of the realty, immediately preceding its removal; not what it would sell for in the open market after its removal.³ But this depends somewhat on the nature of the action. Thus, if one sues for damages to the freehold caused by the removal of a fence, he may recover the value of the fence as it stood annexed to the realty, that is, its value as a fence. But if he sues for the value of the fencing after removal, treating it as personal property, all he can recover is the value of the material.⁴ Similar reasoning, though yielding, perhaps, in practice a different result, applies to the extraction or severance of raw materials. Thus if the action is brought for injuries to the freehold, the measure of damages is the value of the property at the time of severance, less the expense of separating or extracting it.⁵ But where demand is made for the property after its separation from the realty has reduced it to a chattel, and action is then brought for its conversion, the measure of damages is its value at the time of conversion, without deduction of expense for its previous treatment.⁶

§ 75. Trees.—The measure of damages for the destruction of fruit-bearing trees is what they are worth on the premises in their growing state, and not as taken up and removed from the place.⁷ In the case of forest trees having no value except as timber, the means by which to determine the damage occasioned by their removal must be quite different from that pursued in determining the value of fruit trees, which may have no value whatever when removed from the soil, and which, at any rate, are chiefly valuable for that which they produce in a growing

3. *Rhoda v. Alameda County*, 58 Cal. 357. See **FIXTURES**.

4. *Pennybecker v. McDougal*, 48 Cal. 160.

5. *Goller v. Fett*, 30 Cal. 481; *Maye v. Yappen*, 23 Cal. 306.

6. *Maye v. Yappen*, 23 Cal. 306.

7. *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412; *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401.

state.⁸ The same rule holds good for the cutting down of immature forest trees which have yet to acquire a value from growth, the measure of damages being the injury done to the land, and not the value of the trees as fire-wood.⁹ Thus damage should be estimated with regard to all the circumstances, and the purpose for which the trees were used or designed, and not according to the speculative or fanciful ideas entertained by the plaintiff or the jury as to their worth.¹⁰ But in the case of destruction of mature forest trees without injury to the soil, the measure of damages is the value of the trees apart from the value of the land.¹¹ The penalty imposed by law of one hundred dollars for the malicious destruction of a tree on a public highway¹² cannot be made the measure of actual damages for the destruction of such a tree.¹³

§ 76. Growing Crops.—The proper measure of damages for the destruction of a growing crop is the value of the crop in the condition it was in at the time and place of destruction.¹⁴ This value is determined by ascertaining the market value of the probable yield in the nearest market at harvest time, and deducting therefrom the cost of producing, harvesting and marketing the crop.¹⁵ The rental value of the land, plus the cost of labor and materials expended on the crop up to the time of its destruc-

8. *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401.

9. *Chipman v. Hibberd*, 6 Cal. 162; *Doak v. Mammoth Copper Mining Co.*, 192 Fed. 748.

10. *Chipman v. Hibberd*, 6 Cal. 162.

11. *Doak v. Mammoth Copper Mining Co.*, 192 Fed. 748.

12. Pol. Code, § 2742.

13. *Santa Barbara v. Moore*, 175 Cal. 6, L. R. A. 1917F, 385, 164 Pac. 895. See LOGS AND TIMBER.

14. See CROPS, ante, § 82.

15. *Barlow v. Frink*, 171 Cal. 165, 152 Pac. 290; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 4 Pac. 381; *Telander v. Tujunga Water & Power Co.*, 43 Cal. App. 492, 185 Pac. 504; *McGillivray v. Hampton*, 39 Cal. App. 726, 179 Pac. 733; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Catlett v. Bennett*,

tion, with legal interest, does not furnish the proper means of determining the value of the crop.¹⁶

For Breach of Contract.

§ 77. Statutory Provisions.—The general measure of damages for breach of contract is declared by the Civil Code as follows:

“For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.”¹⁷

The Civil Code further provides:

“If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.”¹⁸

Special statutory provisions fix the measure of damages for breach of certain specific contracts, as for breach of

37 Cal. App. 91, 173 Pac. 598; Strecker v. Gaul, 35 Cal. App. 619, 170 Pac. 646; Griffith v. Welbanks & Co., 29 Cal. App. 238, 155 Pac. 120; Allen v. Los Molinos Land Co., 25 Cal. App. 206, 143 Pac. 253 (breach of contract to furnish irrigating water, applying Civ. Code, § 3300. See *infra*, § 77). See Teller v. Bay & River Dredging Co., 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942, holding that the potentiality of growth and maturity in standing crops is an element of value for the loss of which damages may be given. See *supra*, § 73, as to measure of damages for destruction of an alfalfa field.

16. Barr v. Branstetter, 42 Cal. App. 725, 184 Pac. 409; Teller v. Bay & River Dredging Co., 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; Teller v. Bay & River Dredging Co., 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942. But see Crow v. San Joaquin etc. Irr. Co., 130 Cal. 309, 62 Pac. 562, 1053 (holding that where lost profits are too speculative to be recovered, the measure of damage for breach of contract to furnish irrigating water is the rental value of the land with the water, less its rental value without it).

17. Civ. Code, § 3300.

18. Civ. Code, § 1512.

the agreement to buy or sell real estate,¹⁹ for breach of covenant,²⁰ for breach of the contract of sale of personality¹ and for breach of warranty;² for breach of a carrier's obligations,³ for breach of the warranty of an agent's authority,⁴ for breach of promise of marriage,⁵ on the undertaking for the appearance of one charged with contempt of court,⁶ or the revocation of a submission to arbitration,⁷ and for the dishonor of foreign bills of exchange.⁸ In applying the measure of damages prescribed by section 3300, it has been said that regard must be had also to the further provision of section 3301 of the Civil Code, which is to the effect that no damages can be recovered which are not clearly ascertainable both in their nature and origin.⁹

§ 78. General Principles.—The general rule as to the measure of damages for breach of contract is the actual loss sustained.¹⁰ It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract to recover more upon its breach than he would have received by its due performance.¹¹ Where a contract is susceptible of partial performance, the damages sustained by an incomplete performance, or partial breach, are apportionable according to the extent of the failure.¹² Damages for breach of contract must be

19. Civ. Code, §§ 3306, 3307. See VENDOR AND PURCHASER.

20. Civ. Code, §§ 3304, 3305. See COVENANTS, vol. 7, p. 774.

1. Civ. Code, §§ 3307-3311, 3353, 3354. See SALES.

2. Civ. Code, §§ 3312-3314.

3. Civ. Code, §§ 3315-3317. See CARRIERS, vol. 4, p. 892 et seq.

4. Civ. Code, § 3318. See AGENCY, vol. 1, p. 816.

5. Civ. Code, § 3319. See BREACH OF PROMISE OF MARRIAGE.

6. Code Civ. Proc., § 1220. See CONTEMPT, vol. 5, p. 944.

7. Code Civ. Proc., § 1290. See ARBITRATION AND AWARD, vol. 3, p. 55.

8. Civ. Code, §§ 3234-3238. See NEGOTIABLE INSTRUMENTS.

9. *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460. See *supra*, §§ 23, 24, as to uncertain and speculative damages.

10. *Baldwin v. Bennett*, 4 Cal. 392.

11. *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487.

12. *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952.

awarded according to the rules for their legal admeasurement, and cannot be left to the discretion of the jury.¹³ And the jury must determine the amount as a fact, upon the evidence, and cannot determine it by mere conjecture.¹⁴ In actions founded upon a breach of contract, the common law adhered with great tenacity to the rule which excluded all inquiry into the motive or animus of the contracting parties, and limited the damages to the direct pecuniary loss resulting from the breach. But under the system of code pleading, where only one form of action obtains, a breach of contract accompanied by circumstances of fraud, as in the making of the contract, and of hardship and oppression, may be compensated not only by the mere pecuniary loss resulting from the breach, but by such damages as will be commensurate with the entire injury sustained, though certain of the matters complained of are of a tortious character.¹⁵ Where a party, in bad faith, enters into a contract which he knows he cannot fulfill and which will involve expense to the other party, the element of bad faith clothes the court with power to fix damages according to the detriment shown by the existing special circumstance of the case, whatever measure of damages may be theoretically adopted. In such a case the damages would be those which would ordinarily and proximately follow from the breach, under the peculiar circumstances known to both parties.¹⁶

In equity.—The legal measure of damages for breach of contract, whatever it may be in the specific case, holds good in equity, when suit is brought for specific perform-

13. *Weichers v. Dehail*, 41 Cal. App. 547, 183 Pac. 187.

14. *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427.

15. *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142.

16. *Kline v. Guaranty Oil Co.*,

167 Cal. 476, 140 Pac. 1. See *supra*, § 28, as to damages within contemplation of the parties; *supra*, § 35, as to recovery for mental suffering attending breach of contract; and *supra*, §§ 36-40, as to recovery for loss of profits.

ance with compensation for partial breach, and the compensation must be adjusted by that measure.¹⁷

§ 79. "Value," in General.—The word "value" when applied to property without expressed qualification means the price the property would command in the open market.¹⁸ When there is no market at the place where value is to be determined, the expense of getting the goods to the nearest market must be deducted from the price there.¹⁹ It seems that the price at which particular sales have been made, cannot be shown in proof of market value.²⁰ At all events, the fact that a certain sum may have been paid for a business or property does not of itself necessarily establish its value, for the buyer may have made an improvident purchase.¹ There are, however, certain statutes which make a single sale determinative of value.² The cost of construction is not the test of value, even where the article is intended for a special purpose.³ Ordinarily "value" means market value, and

17. *Messer v. Hibernia Sav. etc. Society*, 149 Cal. 122, 84 Pac. 835; *McCowen v. Pew*, 147 Cal. 299, 81 Pac. 958. See SPECIFIC PERFORMANCE.

18. *Dean v. Hawes*, 29 Cal. App. 689, 157 Pac. 558; *Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295.

19. *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Dabovich v. Emeric*, 12 Cal. 171. But see *J. J. Moore & Co. v. J. S. Guerin & Co.*, 165 Cal. 534, 132 Pac. 1038, holding that a failure to deliver coal at the "ship's side" entitles the purchaser to buy in the nearest market, without deduction for transportation charges.

20. *Fairchild etc. Co. v. Southern etc. Co.*, 158 Cal. 264, 110 Pac. 951, But see *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091, holding that the price at which a thing is sold may be shown as tending

to prove its value. See *infra*, § 140, as to admissibility of evidence of value in general.

1. *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091; *Hister v. Carr*, 34 Cal. 641 (tort); *Cassin v. Marshall*, 18 Cal. 689 (tort); *Haskell v. McHenry*, 4 Cal. 411; *Otten v. Spreckels*, 24 Cal. App. 251, 141 Pac. 224; *Pelberg v. Gorham*, 23 Cal. 349 (tort).

2. *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853. See Civ. Code, §§ 3311, 3353. See *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89, referring to California Code provisions identical with the provisions of the Montana Code and adopting the rule as construed and applied in *Hewes v. Germain Fruit Co.*, *supra*, and in *Hill v. McKay*, 94 Cal. 5, 29 Pac. 402.

3. *Yukon River etc. Co. v. Gratto*,

not the special value of the article to the plaintiff.⁴ And this is true even under statutes using such ambiguous phrases as "value to the buyer,"⁵ or "value to the seller," or describing the determinative price as that "which he could have obtained."⁶ Thus by this last phrase is meant the price which anyone might have obtained in the market, and not the price which the particular individual, in view of his personal limitations, ignorance of market conditions, etc., could obtain.⁷ But a different rule is specially prescribed by statute in certain cases, as follows:

"Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."⁸

It has been held that this code section applies, however, only to property which has also a market value, and where property of special value to the owner has no market value, damages concerning it are fixed by other rules.⁹

§ 80. Value of Instruments in Writing.—The Civil Code prescribes that—

"For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner."¹⁰

Hence, the value of a negotiable instrument is presumed to be the amount for which it is drawn,¹¹ that of corporate stock, its par value. But the other party may meet this inference of value by proof to the contrary.¹²

136 Cal. 538, 69 Pac. 252 (tort). See *infra*, § 140, as to admissibility of evidence of original and replacement costs.

4. *Hurd v. Barnhart*, 53 Cal. 97.

5. *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091; *Meyer v. Sullivan*, 40 Cal. App. 723, 181 Pac. 847. See Civ. Code, § 3308.

6. See Civ. Code, § 3353.

7. *Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295.

8. Civ. Code, § 3355.

9. *Willard v. Valley Gas & Fuel Co.*, 171 Cal. 9, 151 Pac. 286.

10. Civ. Code, § 3356.

11. *Survey v. Wells, Fargo & Co.*, 5 Cal. 125.

12. *Peek v. Steinberg*, 163 Cal.

It has been held that the value of a disputed claim is not, as a matter of law, its amount, since the very fact of the dispute reduces its value.¹³

§ 81. Contract Price as the Measure of Damages.—Where a contract to deliver money or property, or to perform services, has been performed, and the property delivered or the services rendered, the contract price becomes the measure of damages since it accurately represents the extent of the plaintiff's loss.¹⁴

“Where the case is clear of fraud on the part of the defendant, it is always the aim of the court to give damages, and such damages only, as will compensate the plaintiff for his loss; and the rule that the contract furnishes the measure of damages is never permitted to override the other rule, except when the parties have stipulated as to the amount of damages in case of a breach.”¹⁵

Where a special contract has been deviated from in performance by mutual consent, the compensation stipulated for, remains the measure of recovery as far as the work can be traced under the contract.¹⁶ And where, from the nature of the contract, it is not practicable to ascertain the amount of damages sustained by its breach, the meas-

127, 124 Pac. 834. See CORPORATIONS, vol. 6, p. 743.

While the payment of dividends and their amount are elements affecting the value of corporate stock, it by no means follows that the stock has no value because no dividends are paid. *Glindemann v. Ehrenpfort*, 29 Cal. App. 87, 154 Pac. 481.

13. *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

14. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769 (holding that the rule applies when the contract has been substantially completed); *Ceder-*

berg v. Robison, 100 Cal. 93, 34 Pac. 625; *Utter v. Chapman*, 38 Cal. 659.

15. *Utter v. Chapman*, 38 Cal. 659 (per Rhodes, J.).

16. *De Boom v. Priestly*, 1 Cal. 206.

In an action for damages for fraud the plaintiff, in view of sections 1709 and 3294 of the Civil Code, may recover both actual and exemplary damages, although the compensation to be paid was fixed by contract. *Thompson v. Modern School, etc.*, 183 Cal. 112, 190 Pac. 451.

ure is the price agreed to be paid.¹⁷ It has been said that where the general rule is inapplicable, the party guilty of the breach cannot complain that a different rule is invoked, when it is the only one left to make him responsible for his wrong.¹⁸ A contract to make such repairs to a steamboat as the contractor deems necessary to secure certain results, which the owner prevents being fully carried out, falls within the rule, the nature, extent, and probable cost of the work contemplated by the contractor being unknown.¹⁹ So, also, does the case where a stipulated price has been agreed on for personal services of a special character,²⁰ such as those of an attorney.¹ And in an action on a quantum meruit for work done under a special contract, the contract price is evidence of the value of materials furnished and services rendered.²

§ 82. Prevention of Performance.—Since, normally, the contract price includes compensation for the contractor's own labor and the use of his own property in doing the work,³ it is clear that where performance is wrongfully prevented in whole or in part, the contractor cannot be allowed the full contract price, since that would compensate him for labor unperformed and for expenses of performance which he has not borne.⁴ The measure of dam-

17. *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Coffee v. Meiggs*, 9 Cal. 363; *Baldwin v. Bennett*, 4 Cal. 392.

18. *Baldwin v. Bennett*, 4 Cal. 392.

19. *Coffee v. Meiggs*, 9 Cal. 363.

20. *Baldwin v. Bennett*, 4 Cal. 392.

1. *Bartlett v. Odd Fellows Savings Bank*, 79 Cal. 218, 12 Am. St. Rep. 134, 21 Pac. 743; *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Newmire v. Ford*, 20 Cal. App. 337, 128 Pac. 952 (placing the decision,

however, on section 3302 of the Civil Code, fixing the measure of damages for breach of contract to pay money only. See *infra*, § 85).

2. *Lacy Mfg. Co. v. Los Angeles Gas etc. Co.*, 12 Cal. App. 37, 106 Pac. 413.

3. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625.

4. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *Upstone v. Weir*, 54 Cal. 124; *Cunningham v. Dorsey*, 6 Cal. 19.

ages in such a case is the stipulated compensation for so much of the work as has been actually done;⁵ and, as to the portion unperformed, the contract price less the expense of completing performance, or, in other words, the profits lost.⁶ Concisely stated, the rule is, recompense for the part performed, and indemnity for loss in respect to the part unexecuted. In the application of the rule, both the contract price⁷ and the cost of performance⁸ may be apportioned to the part of the work unperformed. But the recovery for the unexecuted portion of the contract is not limited in all cases to mere loss of profits. If the contractor has incurred expense in preparation for completing the performance, such outlay is recoverable.⁹ And, under

5. *Cox v. McLaughlin*, 54 Cal. 605; *Upstone v. Weir*, 54 Cal. 124; *Cunningham v. Dorsey*, 6 Cal. 19; *Rousseau v. Cohn*, 20 Cal. App. 469, 129 Pac. 618.

6. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827 (holding that the rule results from the application of Civ. Code, § 1512. See *supra*, § 77); *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Cal. 1020; *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *O'Connell v. Main etc. Hotel Co.*, 90 Cal. 515, 27 Pac. 373; *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952; *Cox v. McLaughlin*, 54 Cal. 605; *Upstone v. Weir*, 54 Cal. 124; *Utter v. Chapman*, 38 Cal. 659; *Coffee v. Meiggs*, 9 Cal. 363; *Cunningham v. Dorsey*, 6 Cal. 19; *Blair v. Brownstone Oil & R. Co.*, 35 Cal. App. 394, 170 Pac. 160; *Rousseau v. Cohn*, 20 Cal. App. 469, 129 Pac. 618 (breach of contract with architect for services). See *supra*, §§ 36-40, as to recovery for

loss of profits in general. See *SALES*, as to the measure of damages for a buyer's refusal to accept goods contracted for.

7. *Upstone v. Weir*, 54 Cal. 124.

8. *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952.

9. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *O'Connell v. Main etc. Hotel Co.*, 90 Cal. 515, 27 Pac. 373; *Upstone v. Weir*, 54 Cal. 124; *Blair v. Brownstone Oil & R. Co.*, 35 Cal. App. 394, 170 Pac. 160.

The fact that payment for some of the expenditures incurred in anticipation of complete performance was made after suit brought does not affect the right to recover for them. Nor does the further fact that some expenditures were made pursuant to a settlement with a subcontractor about which the owner was not consulted, but which was advantageous to him. *O'Connell v. Main etc. Hotel Co.*, 90 Cal. 515, 27 Pac. 373 (holding that the case is not one of a buyer's breach of contract to accept and pay for goods, though the contractor was

certain circumstances, the outlay for which recovery may be had, may include a reasonable allowance for the contractor's own time and services,¹⁰ and it has been held that compensation for the time he necessarily remains idle, after the wrongful termination of the contract, may be given.¹¹ But under sections 3300 and 3358 of the Civil Code,¹² the contractor cannot recover for loss of profits on other contracts he might have taken had he not been waiting for work to be furnished him under the contract in suit.¹³ The rules above given apply where the suit is for breach of express contract. Should the contractor elect to waive the express contract and sue in assumpsit, he can recover only for actual performance, as far as that has been had.¹⁴

§ 83. Estimation of Profits Lost.—In reference to the admeasurement of profits lost through the prevention of complete performance of a contract, the supreme court has said:

“So many elements enter into a calculation of profits, that no rule can be formulated for determining what portion of those which are anticipated for the whole contract shall be allowed when the contract is not completed, but this amount must be left to the wise discretion of an intelligent jury, according to the circumstances of each case. If the contract is nearly completed, the difference between the contract price and the original outlay and cost of performance would be more controlling in determining this question than if the contractor had only entered upon the performance; since, in the former case, the cost of completing the work could be readily ascertained, whereas, in the other, the uncertainty of this cost and the risk to be encountered would vary with the time required for its

also to furnish materials, and hence is not governed by Civ. Code, § 3311).

10. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *Blair v. Brownstone Oil & Refining Co.*, 35 Cal. App. 394, 170 Pac. 160.

11. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625.

12. See *supra*, § 77.

13. *Palm v. Planada Development Corp.*, 175 Cal. 771, 167 Pac. 381.

14. *Upstone v. Weir*, 54 Cal. 124.

completion. . . . The difficulty in any case is not to determine whether the loss of profits upon his contract constitutes a part of his damage, as the cases all admit that this is an element which enters into his damage, but to determine what portion of the profits he has lost by the breach of his contract. If this amount can be accurately ascertained, the plaintiff is entitled thereto, but he is not to be deprived of all profits because they are not susceptible of exact measurement."¹⁵

§ 84. Illustrations of Damages for Breach of Contract.—

Where one promises to make payment out of the proceeds of a mine, and then by his own act renders performance impossible, he becomes liable for the whole amount as the measure of damages for his breach.¹⁶ Where one places money with which to pay his debt, in the hands of another who agrees to pay it to the creditor but fails to do so, the ordinary consequence would be that the depositor would be obliged to pay the creditor himself, and this circumstance would furnish his rule of damages. But special damages, such as those arising from seizure and sacrifice of the depositor's other property at suit of the unsatisfied creditor, might be recovered if within the contemplation of the parties.¹⁷ The measure of damages for breach of an agreement to plant land to a certain variety of grape vine is the difference between the value of the land planted as agreed, and in its actual state, the time for determining these values being when the owner discovered the breach, or could with reasonable diligence have discovered it; in other words, when the cause of action accrued. In no case would it be the time of trial.¹⁸ In estimating prospective profits arising from the produce and enhanced value of land planted to fruit trees, all the hazards and expenses incident to the process of supposed

15. *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625 (per Harrison, J.).

16. *Grant v. Warren*, 31 Cal. App. 453, 160 Pac. 847.

17. *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882.

18. *Waldteufel v. Pacific Vineyard Co.*, 6 Cal. App. 624, 92 Pac. 747.

growth must be considered.¹⁹ In a case where a soap salesman was possessed of a secret formula, and contracted with defendant to make soap according to it, and proceeded to incur expense and spend time in creating a market for it, and other expense in furnishing ingredients and paying for soap delivered, the measure of his damages for the defendant's willful failure to make the soap according to formula would be at the least the difference between his actual expenditures, including the value of his own services, and the sums received by him from the sales made by him of the soap furnished by defendant, up to the time when the market he had created had been destroyed in consequence of the defendant's breach.²⁰

§ 85. Contracts to Pay Money Only.—The code provides that

“The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.”¹

Under the code provision, damages over and above interest are not recoverable for nonpayment of money due under a contract.² This, however, may fall far short of complete indemnity. For the creditor, from want of the money, may have suffered in his credit or become bankrupt and lost his fortune. Complete indemnity would require compensation for all such losses. But to adopt such a rule would tend to drive all but the reckless and imprudent from all business involving monetary transactions.³ This code rule applies only to contractual relations and defines the detriment caused by breach of an agreement to pay a liquidated amount. It does not attempt to provide a

19. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

20. *Grosse v. Petersen*, 30 Cal. App. 482, 158 Pac. 511.

1. Civ. Code, § 3302; *Friend & Terry L. Co. v. Miller*, 67 Cal. 464,

8 Pac. 40. See *infra*, § 126, as to pleading damages as to debts incurred.

2. *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275.

3. *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40.

measure of damage for torts, or for contractual obligations of an implied character.⁴ So too the code provision applies only where the consideration has passed to the promisor and he has given an absolute promise to pay. But when the consideration has not passed, when the contract is executory on both sides, when the promise of the obligor is contingent upon the performance of covenants by the other party, then the amount named to be paid is not by any means the absolute measure of damages for a breach of the contract. In such case only actual damages, if any can be shown, can be recovered for breach by the obligor.⁵ A contract for the purchase of mining stock to be returned and the price refunded in case the purchaser is dissatisfied after examining the property, presents, after such dissatisfaction and tender of a return of the stock, a case falling within the section. In such a case the value of the stock is immaterial, liability not being in any way dependent thereon.⁶

§ 86. Building and Construction Contracts.—Ordinarily, the measure of damages for the breach of a contract to construct a building, levee, fence or any similar work, where payment has already been made, is the cost of doing,

4. *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939 (holding that this section does not apply to the obligation of a bank to honor a depositor's check).

5. *Hellings v. Heydenfeldt*, 107 Cal. 577, 40 Pac. 1026 (holding that when parties to an agreement for the compromise of litigation for a certain sum continues after the other party had refused to pay, to prosecute their action, they could not recover the sum stipulated, since they had not performed on their own part, but could secure only actual damages). *Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep.

488, 26 Pac. 967 (holding that the statute does not apply to rents accruing under a lease which the tenant has repudiated, the landlord having rented the property to others).

6. *Dickinson v. Zubiati Mining Co.*, 11 Cal. App. 656, 106 Pac. 123. But see *Dean v. Hawes*, 29 Cal. App. 689, 157 Pac. 558, holding that the measure of damages for a vendor's breach of agreement to repurchase the property for a fixed sum is the difference between that and the market value. See *supra*, § 81, as to the contract price as the measure of damages in general.

or completing, the work.⁷ But if the price has not been paid, the measure of damages is the excess of the cost of doing, or completing the work over the unpaid portion of the price.⁸ Damages for the delay suffered by the owner are also recoverable.⁹ A clause in a building contract imposing a penalty of a fixed sum per day on the contractor for delay in completing the work, does not operate to restrict the owner's recovery of damages when the contractor has wholly abandoned the contract.¹⁰ Where a contract is substantially fulfilled, the measure of damage for the residual noncompliance is the cost of perfecting performance, and not of reconstruction after disregarding work already done.¹¹ But the measure of damages for the unauthorized substitution of one kind of construction material for another in a building is the cost of replacing the substituted material by the material

7. *Wallace v. Ah Sam*, 71 Cal. 197, 69 Am. Rep. 534, 12 Pac. 46 (levees); *Taylor v. North Pacific Coast R. R. Co.*, 56 Cal. 317 (wagon road); *Turner v. Howze*, 28 Cal. App. 167, 151 Pac. 751 (street work, sidewalks and curbs); *Fabian v. Lammers*, 3 Cal. App. 109, 84 Pac. 432 (breach of a contract between owners of adjoining swamp-lands to build a connecting levee for their joint reclamation).

The measure of damages for the breach of a contract to build a railroad across the land of one of the parties and to the center of a city is the difference between the value of the land with the contract consummated, and the same contract broken. And where by a partial performance the land has been injured by cuts and embankments, this injury becomes an element in determining the depreciation. *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53.

8. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46; *Richmond Wharf & Dock Co. v. Blake*, 39 Cal. App. 1, 177 Pac. 508; *Dunne Inv. Co. v. Empire State S. Co.*, 27 Cal. App. 208, 150 Pac. 405, 411; *Electric Imp. Co. v. San Jose etc. R. Co.*, 3 Cal. Unrep. 618, 31 Pac. 455.

9. *Dunne Inv. Co. v. Empire State S. Co.*, 27 Cal. App. 208, 150 Pac. 405, 411; *Electric Imp. Co. v. San Jose etc. R. Co.*, 3 Cal. Unrep. 618, 31 Pac. 455. See *supra*, §§ 82, 83, as to prevention of performance by owner.

10. *Sinnott v. Schumacher*, 45 Cal. App. 46, 187 Pac. 105.

11. *Joseph Musto Sons-Keenem Co. v. Pacific States Corp.*, 32 Cal. App. Dec. 787, 192 Pac. 138; *Carpenter v. Ibbetson*, 1 Cal. App. 272, 81 Pac. 1114.

called for in the contract, though where the value of the building has not been materially affected, this would seem to place a harsh penalty on the contractor.¹² In an action for removing earth from a lot in excess of the amount called for by contract, a judgment allowing the owner to recover for the value of the excess removed, and also for the expense of replacing it, allows a double recovery, and is erroneous.¹³

V. INADEQUATE AND EXCESSIVE DAMAGES.

§ 87. Power of Courts.—Under section 657 of the Code of Civil Procedure, a new trial may be granted for “excessive damages, appearing to have been given under the influence of passion or prejudice,” and also for “insufficiency of the evidence to justify the verdict or other decision.”¹⁴ While a new trial may be granted for the cause of “excessive damages, appearing to have been given under the influence of passion and prejudice,” there is no warrant in the law for setting aside a finding because of the passion or prejudice of the jury exhibited in giving insufficient damages.¹⁵ But it is well settled that an inadequate recovery may be set aside and a new trial granted on the ground that the evidence does not justify the verdict.¹⁶

12. *Pence v. Dennie*, 41 Cal. App. 428, 182 Pac. 980.

13. *Sherman v. Gray*, 11 Cal. App. 348, 104 Pac. 1004.

14. See *NEW TRIAL*, as to general questions of power and procedure in granting new trials.

15. *Benjamin v. Stewart*, 61 Cal. 605.

16. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108; *Wolford v. Lyon Gravel G. M. Co.*, 63 Cal. 483; *Benjamin v. Stewart*, 61 Cal. 605;

Mariani v. Dougherty, 46 Cal. 26; *Hall v. Bark Emily Banning*, 33 Cal. 522; *Donnatin v. Union Hardware & Metal Co.*, 38 Cal. App. 8, 175 Pac. 26, 177 Pac. 845; *Taylor v. Northern Electric Ry. Co.*, 26 Cal. App. 765, 148 Pac. 543.

A failure properly to allow a trivial amount in actual damages does not require a reversal on appeal. *Connell v. Harron, Rickard & McCone*, 7 Cal. App. 745, 95 Pac. 916. See, generally, *NEW TRIAL*;

§ 88. **General Rule.**—Courts are not authorized to set aside the award of damages made by the jury as excessive merely because the opinion of the judge is at variance with that of the jurors. It is only where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that the court may exercise this power.¹⁷ This.

and see for instances of inadequate and excessive damages, *infra*, §§ 91-93.

17. *Grant v. Los Angeles Transfer Co.*, 45 Cal. App. 731, 188 Pac. 294; *Martin v. Shea*, 182 Cal. 130, 187 Pac. 23; *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 Pac. 800; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 12 A. L. R. 1007, 184 Pac. 672; *Smith v. Royer*, 181 Cal. 165, 183 Pac. 660; *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223; *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234; *Nolen v. F. O. Engstrum Co.*, 175 Cal. 464, 166 Pac. 346; *Price v. Southern Electric Ry. Co.*, 168 Cal. 173, 142 Pac. 91; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108; *Hale v. San Bernardino etc. Tr. Co.*, 156 Cal. 713, 106 Pac. 83; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12; *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106; *Mize v. Hearst*, 130 Cal. 630, 63 Pac. 30; *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270; *Roche v. Redington*, 125 Cal. 174, 57 Pac. 890; *Clare v. Sacramento Elec. etc. Co.*, 122 Cal. 504, 55 Pac. 326; *Harrison v. Sutter*

St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983; *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118, 35 Pac. 572; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112; *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 Pac. 601; *Swain v. Fourteenth St. R. R. Co.*, 93 Cal. 179, 28 Pac. 829; *Russell v. Dennison*, 45 Cal. 337; *Wheaton v. North Beach & M. R. R. Co.*, 36 Cal. 590; *Boyce v. California Stage Co.*, 25 Cal. 460; *Aldrich v. Palmer*, 24 Cal. 513; *George v. Law*, 1 Cal. 363; *Payne v. Pacific Mail S. S. Co.*, 1 Cal. 33; *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808; *Guderitz v. Broadway Bros.*, 39 Cal. App. 48, 177 Pac. 859; *Scragg v. Salles*, 24 Cal. App. 133, 140 Pac. 706; *McGrory v. Pacific Electric Ry. Co.*, 22 Cal. App. 671, 136 Pac. 303; *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082; *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441; *Townsend v. Briggs*, 3 Cal. Unrep. 803, 32 Pac. 307. See *Southern Pac. Land Co. v. Meserve*, 186

rule applies to appellate, as well as trial, courts.¹⁸ Indeed, it is said that "much less is a reviewing court justified in setting aside a verdict" on this account.¹⁹ But "the trial court should be vigilant to set aside verdicts where there is reason to believe passion, prejudice or sympathy has influenced the jury."²⁰ The rule applies equally to consideration of the findings of fact made by the trial court when sitting without a jury, as to a verdict.¹

Inadequate damages.—It has been held that five hundred dollars is an inadequate recovery for blows on the head, laceration of the scalp, laceration of the left elbow resulting in the loss of the arm, and great pain and suffering, suffered by a man forty-six years of age and previously in good health.²

Cal. 157, 198 Pac. 1055, where, in an action for damages for the wrongful occupation of land, a judgment fixing the value of the use at two hundred dollars per year was held excessive. And see cases cited *infra*, § 92, illustrating the rule in particular personal injury cases; and *infra*, § 91, for applications of the rule in cases involving breaches of contract.

18. *Scott v. Times-Mirror Co.*, 181 Cal. 345, 12 A. L. R. 1007, 184 Pac. 672; *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223; *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234; *Nolen v. F. O. Engstrum Co.*, 175 Cal. 464, 166 Pac. 346; *Price v. Northern Electric Ry. Co.*, 168 Cal. 173, 142 Pac. 91; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108; *Hale v. San Bernardino Tr. Co.*, 156 Cal. 713, 106 Pac. 83; *Mize v.*

Hearst, 130 Cal. 630, 63 Pac. 30; *Roche v. Redington*, 125 Cal. 174, 57 Pac. 890; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Swain v. Fourteenth St. R. R. Co.*, 93 Cal. 179, 28 Pac. 829; *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325; *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441.

19. *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082.

20. *Du Val v. Boos Bros. Cafeteria Co.*, 45 Cal. App. 377, 187 Pac. 767.

Practically, the trial court must bear the whole responsibility in every case. *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234.

1. *Martin v. Shea*, 182 Cal. 130, 187 Pac. 23. See *NEW TRIAL*.

2. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108.

§ 89. **Consideration of Question by Trial Court.**—Damages for a personal injury cannot be held excessive, as a matter of law, simply because the amount may be larger than ordinarily allowed in such cases.³ Nor does the mere fact that interest at the legal rate, on the amount awarded for personal injuries, would exceed plaintiff's past and probable future earnings, demonstrate that the recovery is excessive. Such a rule of estimate does not apply where the plaintiff sues for his own injuries, but only where suit is brought for the death of a relative.⁴ Under a statute expressly authorizing the jury to award such damages, both pecuniary and exemplary, as they shall deem fair and just, their discretion should not be interfered with by the court except in case of most palpable abuse.⁵ Granting a new trial for misconduct, such as may be shown by affidavit, is wholly different from relieving against excessive damages. The former contemplates some overt impropriety, while an excessive verdict does not necessarily imply misconduct.⁶ There is no absolute rule for determining whether a verdict is excessive.⁷ The only method of doing so is by comparing the amount awarded with the evidence.⁸ The fact that the evidence is without conflict does not necessarily determine the question of passion or prejudice to the jury.⁹ The determination of the trial court,

3. *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082.

4. *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 Pac. 601. See *DEATH*.

5. *Myers v. San Francisco*, 42 Cal. 215.

Although courts will not often disturb a verdict as awarding excessive damages, they will do so if necessary to effect the ends of justice. *McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339. See *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112, holding that in cases of wanton and aggravated trespass, the amount

of damages is a question peculiarly for the jury.

6. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019.

7. *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 Pac. 601.

8. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019 (holding that affidavits cannot be used on the inquiry).

9. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019.

however, that the verdict is excessive does not necessarily amount to a finding of passion or prejudice in the jury. It may amount to no more than a holding that the award was not justified by the evidence.¹⁰ When the trial court orders the remission of a portion of the recovery as a condition for refusing a new trial, and this is done, the case is in the same condition, as far as the propriety of the jury's action is concerned, as if a verdict had been returned in the first instance for the reduced amount.¹¹

§ 90. Consideration on Appeal.—The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on the motion for a new trial.¹² The excessive character of the award must appear from the face of the record itself.¹³ In considering an attack upon a verdict as inadequate or excessive, the appellate court must treat every conflict in the evidence as resolved in favor of the respondent, and must give him the benefit of every inference that can be reasonably drawn in support of his claim.¹⁴ The action of the trial court in granting a new trial because of excessive damages, must clearly appear to have been an abuse of discretion before an appellate court will interfere with

10. *Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005, 1007; *Lynch v. Southern Pacific Co.*, 24 Cal. App. 108, 140 Pac. 298.

11. *Lynch v. Southern Pacific Co.*, 24 Cal. App. 108, 140 Pac. 298. See NEW TRIAL, as to the power of the court generally to order remission of part of recovery as condition of denying new trial.

A party has the right to remit the excess portion of his recovery of damages. *Muller v. Boggs*, 25 Cal. 175. And by doing this, he waives his right to it; *George v. Law*, 1 Cal. 363.

12. *Williams v. A. R. G. Bus Co.*,

32 Cal. App. Dec. 280, 190 Pac. 1036; *Chiarini v. Rochon*, 1 Cal. Unrep. 540. See APPEAL AND ERROR, vol. 2, p. 302.

13. *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325.

14. *Kimie v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 104 Pac. 312; *Roffel v. Letts*, 31 Cal. App. 426, 160 Pac. 845; *Taylor v. Northern Electric Ry. Co.*, 26 Cal. App. 765, 148 Pac. 543. See *Grant v. Los Angeles Transfer Co.*, 45 Cal. App. 731, 188 Pac. 294, as to force of repeated awards in the trial court.

it.¹⁵ And where there is a material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled.¹⁶ So, though the appellate court would have affirmed an order denying a motion for a new trial sought because of inadequate damages, it does not follow that it will reverse one granting a new trial on that account.¹⁷ The appellate court cannot presume that the jury ignored any element of damage, merely because the amount recovered is small.¹⁸

§ 91. Damages for Breach of Contract Held not Excessive.—It has been held that \$12,219.50 is not an excessive recovery for damages from the failure to construct a building, where the expense to the owner of finishing the work was \$3,819.50 more than the contract price, and damages for delay, as liquidated by the building contract, totaled \$9,300.50, and there was additional loss to the owner through inability to install tenants at the time promised to them.¹⁹ In another case it was held that a verdict for \$2,000 for breach of a contract pursuant to which defendant purchased one hundred and ten acres of land of which plaintiff was to have the management, care and cultivation, and in the profits from the produce and increased value of which he was to share, seventy acres of which was thereupon planted to lemons, was not excessive.²⁰

§ 92. Damages for Personal Injuries Held not Excessive. There is no hard-and-fast rule applicable to the matter

15. *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270; *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118, 35 Pac. 572. See *APPEAL AND ERROR*, vol. 2, pp. 907, 916.

16. *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774.

17. *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576.

18. *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663. See *APPEAL AND ERROR*, vol. 2, p. 887 et seq. And see *NEW TRIAL*.

19. *Dunne Inv. Co. v. Empire State S. Co.*, 27 Cal. App. 208, 150 Pac. 405, 411.

20. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

of determining the question of excessiveness of damages in the particular case. And it is well that this is so and that every case should be judged in such an inquiry by reference primarily to its own facts and circumstances, for no two cases can be exactly the same in every detail of happening and consequence. Because of the varied and innumerable and often indeterminable factors entering into the question, a classification based upon the figures of particular verdicts would be of little practical value. For like reason, general designations of the injuries involved are of doubtful value when considered apart from the proofs in the particular case in reference to the character and extent of the major injury, its complications with other injuries, its effects, whether temporary or permanent, involving in turn, other circumstances or conditions which as sex, age, state of health, occupation, etc. With these observations in mind, reference may be had to the following cases in which verdicts for the amounts stated parenthetically in the notes have been upheld for the personal injuries indicated generally, viz.: injury to the knee;¹ broken and dislocated bones;² injuries and bruises of varied character;³ injuries and nervous shock caused by bites or attacks of animals;⁴ bruises and nervous shock

1. *Sheyer v. Lowell*, 134 Cal. 357, 66 Pac. 307 (\$300); *Fisk v. Poplin*, 31 Cal. App. Dec. 786, 189 Pac. 722 (\$500).

2. *Ehat v. Scheidt*, 17 Cal. App. 430, 120 Pac. 49 (\$500, circumstances justifying exemplary damages as well); *Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993 (\$1,000); *Wheaton v. North Beach & M. R. R. Co.*, 36 Cal. 590 (\$2,000, where the break was followed by permanent weakness and partial disfigurement of the arm).

3. *Johnson v. Hendrick*, 45 Cal.

App. 317, 187 Pac. 782 (\$695); *Baker v. Western Auto Stage Co.*, 32 Cal. App. Dec. 651, 192 Pac. 73 (\$1,000); *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706 (\$750, injuries to head and shoulders on being thrown from wagon); *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197 (\$1,750).

4. *Smith v. Royer*, 181 Cal. 165, 183 Pac. 660 (\$700, severe nervous shock caused by dog bite); *Lindley v. Knowlton*, 31 Cal. App. Dec. 814, 189 Pac. 798 (\$1,500, nervous shock to a growing boy due to an attack by a chimpanzee).

coupled with injury to the kidneys;⁵ wrenched back; nervous shock, lacerations and bruises;⁶ nervous shock with other injuries;⁷ permanent impairment of the sight of one eye;⁸ concussion of the brain, with certain resultant permanent effects, such as insomnia, loss of memory and melancholy;⁹ skull fracture;¹⁰ skull fracture and concussion of the brain, with permanent impairment of sight and hearing, with other injuries;¹¹ permanent loss of hearing in one ear, coupled with impairment of sight and nervous shock,¹² or impairment of the memory and other injuries;¹³ injuries causing continuous suffering and probable permanent injury;¹⁴ injuries to the head resulting in radical changes in mentality, temperament and conduct;¹⁵ injuries rendering one permanently impaired in body and mind;¹⁶ nervous shock due to assault and battery and false imprisonment;¹⁷ breaking of a leg,¹⁸ with other more or less serious injuries to different parts of the body;¹⁹ breaking of the hip, with probable permanent disabilities resulting;²⁰ frac-

5. *McPhee v. Lavin*, 183 Cal. 264, 191 Pac. 23 (\$1,000).

6. *Williams v. A. R. G. Bus. Co.*, 32 Cal. App. Dec. 280, 190 Pac. 1036 (\$1,500).

7. *Kemp v. Van Bezel*, 35 Cal. App. Dec. 492, 199 Pac. 1099.

8. *Benjamin v. Walton*, 181 Cal. 115, 183 Pac. 529 (\$1,000).

9. *Bloomberg v. Laventhal*, 179 Cal. 616, 178 Pac. 496 (\$5,000).

10. *Hardy v. Schirmer*, 163 Cal. 272, 124 Pac. 993 (\$1,900, where assault was wanton and vengeful). And see cases *infra*.

11. *Douglas v. Berlin Dye Works etc. Co.*, 169 Cal. 28, 145 Pac. 535 (\$10,000).

12. *Clare v. Sacramento Elec. etc. Co.*, 122 Cal. 504, 55 Pac. 326 (\$2,000).

13. *Wood v. Los Angeles Trac-*

tion Co., 1 Cal. App. 474, 82 Pac. 547 (\$2,000).

14. *Litherbury v. Kimmet*, 183 Cal. 24, 195 Pac. 660 (\$4,000); *Dolan v. Sierra Ry. Co.*, 135 Cal. 435, 67 Pac. 686 (\$7,000).

15. *Guderitz v. Broadway Bros.*, 39 Cal. App. 48, 177 Pac. 859 (\$2,500).

16. *Hansen v. Sierra etc. Power Co.*, 32 Cal. App. 333, 162 Pac. 924 (\$11,310.05).

17. *Riffie v. Letts*, 31 Cal. App. 426, 160 Pac. 845 (\$2,500).

18. *Roche v. Redington*, 125 Cal. 174, 57 Pac. 890 (\$4,000. In this case a permanent shortening of the leg was caused).

19. *Stone v. Gill*, 34 Cal. App. Dec. 992, 198 Pac. 640 (\$3,500).

20. *Fitzgerald v. Southern Pacific Co.*, 36 Cal. App. 660, 173 Pac. 91 (\$5,000).

ture of the pelvis and nervous shock;¹ breaking of arch of one foot and bruises and burns caused by coming in contact with electric wires;² injuries to the lungs (inducing pneumonia);³ injuries causing permanent deafness;⁴ miscarriage coupled with other and permanent injuries;⁵ physical shock resulting in a miscarriage;⁶ injuries due to abandonment by a physician of a woman in childbirth;⁷ loss of toes;⁸ loss of an arm;⁹ permanent disability of two fingers of the right hand;¹⁰ crushing of the hand in a mangle machine rendering many very painful operations necessary thereon and causing the hand to become permanently useless;¹¹ injuries resulting in the loss of the use of both hands and disfigurements;¹² permanent injury to the knee;¹³ fracture of the neck of the femur

1. *Du Val v. Boos Bros. Cafeteria Co.*, 45 Cal. App. 377, 187 Pac. 767 (\$7,500).

2. *Dow v. Sunset Tel. & Tel. Co.*, 157 Cal. 182, 106 Pac. 587 (\$3,500).

3. *Bannister v. H. Jevne Co.*, 28 Cal. App. 133, 151 Pac. 546 (\$3,500).

4. *Walker v. Southern Pacific Co.*, 162 Cal. 121, 121 Pac. 369 (\$4,000).

5. *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983 (\$10,000).

6. *Easton v. United Trade School Con. Co.*, 173 Cal. 199, L. R. A. 1917A, 394, 159 Pac. 597 (\$5,000).

7. *Lathrope v. Flood*, 6 Cal. Unrep. 637, 63 Pac. 1007 (\$2,000). But see the same case in 135 Cal. 458, 57 L. R. A. 215, 67 Pac. 683, on the hearing in banc, where the court reversed the case, on the ground that a claim for damages by reason of the death of the child caused by the negligence of the defendant "should have been specially pleaded and the right to recover such damages was in the husband alone." In this case the

physician abandoned his patient, a woman in childbirth, at the hour of midnight, leaving her for an hour without attendance, and causing mental suffering reacting on her physical condition.

8. *Aldrich v. Palmer*, 24 Cal. 513 (\$2,250, loss of two toes with resultant injuries including symptoms of tetanus).

9. *Diehl v. Swett-Davenport Lumber Co.*, 14 Cal. App. 495, 112 Pac. 561 (\$5,000); *Townsend v. Biggs*, 3 Cal. Unrep. 803, 32 Pac. 307 (\$9,000); *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409 (\$10,000).

10. *Duran v. Yellow Aster Min. etc. Co.*, 40 Cal. App. 633, 181 Pac. 395 (\$4,000).

11. *Perry v. Angelus Hospital Assn.*, 172 Cal. 311, 156 Pac. 449 (\$11,500).

12. *Faras v. Lower California Dev. Co.*, 27 Cal. App. 688, 151 Pac. 35 (\$12,000).

13. *Kimball v. Northern Electric Co.*, 159 Cal. 225, 113 Pac. 156 (\$4,100).

rendering the injured person a permanent invalid;¹⁴ crushing and permanent shortening of the leg;¹⁵ compound fracture of and crushing of the leg below the knee;¹⁶ severe scalding;¹⁷ spinal and other injuries;¹⁸ injuries to the back, with permanent injury to the nervous system;¹⁹ shock resulting in neurasthenia and other permanent injuries;²⁰ injury causing atrophy and partial paralysis of an arm of a growing child;¹ injuries resulting in rupture, chronic peritonitis, and other ailments;² serious injuries to different parts of the body, including the arm and shoulder, involving rupture of the ligaments, impairment of memory and probable permanent disability;³ lacerations, denuding of flesh, and permanent disfigurement of the face rendering it unrecognizable as a human face;⁴ injuries of serious and permanent nature, including loss of an arm and impairment of health;⁵ fracture of bones of the leg with fracture of some of the ribs and other injuries including sensory paralysis of an arm;⁶ injuries resulting in various permanent injuries, incapacities and disabilities; injuries causing one to be a per-

14. *Boa v. San Francisco-Oakland Terminal Ry.*, 182 Cal. 93, 187 Pac. 2 (\$8,000).

15. *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 Pac. 800 (\$10,000).

16. *Grant v. Los Angeles Transfer Co.*, 45 Cal. App. 731, 188 Pac. 294 (\$10,000).

17. *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425 (\$5,000).

18. *Clowdis v. Fresno Flume etc. Co.*, 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373 (\$5,500).

19. *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 379, 104 Pac. 986 (\$6,400).

20. *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 104 Pac. 312 (where the verdict was for \$7,000, but the court denied new

trial upon plaintiff's complying with an order requiring him to remit \$600 of the amount of the judgment).

1. *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325 (\$7,500).

2. *Klein v. Atchison etc. Ry. Co.*, 12 Cal. App. 285, 107 Pac. 147 (\$8,500).

3. *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 Pac. 601 (\$15,000).

4. *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082 (\$15,000).

5. *Meek v. Pacific Electric Ry. Co.*, 175 Cal. 53, 164 Pac. 1117 (\$15,000).

6. *Lynch v. Southern Pacific Co.*, 24 Cal. App. 108, 140 Pac. 298 (\$15,750).

manent cripple,⁷ or causing progressive deterioration of the body, or of certain of its functions,⁸ or great and permanent disfigurement;⁹ or causing one to be a paralytic.¹⁰

§ 93. Damages for Personal Injuries Held Excessive.—

It has been held not an abuse of discretion, in the trial court, to grant a new trial for excessive damages, where the recovery was twenty-five thousand dollars for the loss of one leg below the knee, and confinement in the hospital for seven months, plaintiff being a railroad brakeman, twenty-three years old, and in previous good health.¹¹ Nor is it abuse of discretion to require a verdict for twenty thousand dollars to be reduced to five thousand as a condition of refusing a new trial, where the chief injury claimed by plaintiff was concussion of the spine resulting in manifold evil consequences, but where the defendant's evidence tended to show that such symptoms were the result of hysteria, that at the time of accident she exhibited no signs of injury, and stated the next day that she had not been hurt but only frightened, and where it is shown on the motion for a new trial that a tumor from which plaintiff was supposed to be suffering did not exist.¹² In a case where the evidence of medical experts was in conflict as to the extent and permanency of the plaintiff's injuries, and there being evidence tending to show that the injury was less serious than the plaintiff contended, it was held under the circumstances attending the case that a

7. *Brinek v. Bradbury*, 179 Cal. 376, 176 Pac. 690 (\$17,354.80); *Campbell v. Bradbury*, 179 Cal. 364, 176 Pac. 685 (\$35,000); *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513 (\$70,000).

8. *Swendsen v. Pacific Electric Ry. Co.*, 175 Cal. 502, 166 Pac. 21 (\$19,500).

9. *Faras v. Lower California Dev. Co.*, 27 Cal. App. 688, 151 Pac. 35 (\$12,000); *Boyce v. California Stage*

Co., 25 Cal. 460 (\$16,500); *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082 (\$15,000).

10. *Perkins v. Sunset Tel. and Tel. Co.*, 155 Cal. 712, 103 Pac. 190 (\$25,000); *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529 (\$30,000).

11. *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118, 35 Pac. 572.

12. *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774.

verdict in plaintiff's favor for thirty thousand dollars damages was excessive and that the defendant was entitled to a new trial on that ground.¹³

VI. LIQUIDATED DAMAGES AND PENALTIES.

In General.

§ 94. **Distinctions.**—Parties may liquidate, by stipulation in advance, the amount to be paid as damages. But the tendency and preference of the law is to regard a stated sum as a penalty, except where the actual damages cannot be ascertained by any standard.¹⁴ Where the sum stipulated to be paid upon breach of the contract is determined to be a penalty, it is not regarded as an actual debt, does not determine the measure of damages, and cannot be recovered. In such a case the party aggrieved is remitted to his just claim for compensation merely.¹⁵ He must prove his actual damages, and if he cannot do so he cannot recover.¹⁶ On the other hand, if he proves actual damages in excess of the penalty named, he may recover the full amount, without regard to the penalty.¹⁷ This general principle of the invalidity of penalties is recognized by the Civil Code which declares that forfeitures may be relieved against upon making full compensation to the other party, except in cases of grossly negligent, willful, or fraudulent breach of duty.¹⁸ The terms by which the parties designate the sum decided upon are to be con-

13. *Fisher v. Southern Pac. R. R. Co.*, 89 Cal. 399, 26 Pac. 894.

14. *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90. See *infra*, § 100 et seq., as to restriction of this right by statute.

15. *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959; *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707; *Jones*

v. Post, 6 Cal. 102 (penal sum fixed in a contract of guaranty).

16. *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707; *Stephens v. Daugherty*, 33 Cal. App. 733, 166 Pac. 375. See *infra*, § 128, as to pleading actual damages.

17. *Sherman v. Gray*, 11 Cal. App. 348, 104 Pac. 1004.

18. Civ. Code, § 3275. See **FORFEITURES.**

sidered in ascertaining the purpose and intent in stipulating the amount to be paid in case of a breach. Such terms are by no means controlling, and, even though the term "penalty" is used, it must be ascertained from a consideration of the nature of the agreement whether there was an actual intent to prescribe a penalty, that is, an intent to determine and define the liability in the case of a breach of the contract without any reference to the actual damage likely to be sustained.¹⁹ With reference to the distinction between liquidated damages and a penalty, the supreme court, in an early case, said:

"The cases upon this subject are numerous, and it is difficult to deduce from them any certain and definite rule. In fact, the transactions of individuals are so various, and the circumstances of many cases so peculiar, that no certain rule can be adopted for all cases."²⁰

It must be remembered that the penalties here referred to are those fixed for themselves by the parties to a contract. Statutory penalties are considered elsewhere in this work¹

§ 95. Intention of the Parties.—In determining whether a provision is for liquidated damages or for a penalty, the construction depends upon the intent of the parties as

19. *Dyer Bros. etc. Iron Wks. v. Central Iron Wks.*, 182 Cal. 588, 189 Pac. 445 (holding that the sums represented by notes constituted liquidated damages and not penalties, although the contract used the word "penalty").

The word "forfeiture" is equivalent to the word "penalty." *Kelley v. Great Western Acc. Ins. Co.*, 31 Cal. App. Dec. 927, 189 Pac. 785.

20. *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676.

1. See PENALTIES.

Section 629 of the Civil Code,

repealed in 1915, which provided that if a gas or electric light corporation refused or neglected to supply gas or electricity to the owner or occupant of a building for the space of ten days after written application, it must pay to the applicant certain specified sums as liquidated damages for every day such refusal or neglect continued in force, imposed a "penalty" for noncompliance, notwithstanding the use of the words "liquidated damages." *Hansen v. Vallejo Electric Light etc. Co.*, 182 Cal. 492, 188 Pac. 999.

evidenced by the entire agreement interpreted in the light of the circumstances under which it was made.² When ascertained, this intention is to be given full effect unless contrary to law. Rules for ascertaining the intention of the parties are intended to solve cases of doubt, and not to enlarge or limit the intention when expressed or clearly ascertainable without their aid. Courts are not warranted in supplanting the intention of the parties, nor in striking from or adding to the contract any term, nor in attempting to modify or reform it, under the vague notion of relieving a party from the hardships of an agreement willingly and knowingly made.³

Where it appears on the face of the contract that the parties intended a penalty, the courts will not enforce another construction.⁴ But where it does not clearly appear that the parties intended the sum named to operate as security, for actual damages only, the court will, in a proper case, regard it as liquidated damages.⁵ Formerly, courts felt largely bound by the language of the parties. More recent authorities, however, have receded from the view that the language of the parties is of any great force in determining the question, their assertions being regarded as mere items in the general mass of evidence going to determine the validity of the provision.⁶ While the terms which the parties use in describing the sum stipulated to be paid are to be considered, they are by no means controlling, and even though the term "penalty" be used it still remains to be determined from the nature of the agreement whether the intent was to actually prescribe a penalty.⁷ While it has

2. *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707; *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90; *Streeter v. Rush*, 25 Cal. 67.

3. *Streeter v. Rush*, 25 Cal. 67.

4. *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417.

5. *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162.

6. *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959.

7. *Dyer Bros. etc. Works v. Central Iron Works*, 182 Cal. 588, 189 Pac. 445.

been sometimes said that the use of the word "penalty" is absolutely controlling, though the term "liquidated damages" is not, there is no good reason for attributing such different efficacy to the use of these terms.⁸ But it has been intimated that the explicit declaration by the parties that the sum agreed to be paid is stipulated damages, may be conclusive.⁹ Where the contract contains both the terms "penalty" and "liquidated damages," or equivalent terms, or where it contains neither, the court will ascertain the intention of the parties from the whole instrument, as in cases usually.¹⁰

§ 96. Relation Between Sum Stipulated and Actual Damage.—The characteristic feature of a penalty is that it bears no relation to the actual damage which may be caused by a breach, but is arbitrarily fixed without any attempt to estimate the amount of injury.¹¹ Thus, while a sum agreed to be paid for the nonpayment of a less sum, where intended as a security is a penalty,¹² where

8. *People v. Love*, 19 Cal. 676.

9. *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417; *Streeter v. Rush*, 25 Cal. 67; *Consolidated L. Co. v. Los Angeles*, 33 Cal. App. 698, 166 Pac. 385.

10. *Streeter v. Rush*, 25 Cal. 67. See *CONTRACTS*, vol. 6, p. 258.

11. *Dyer Bros. etc. Works v. Central Iron Works*, 182 Cal. 588, 189 Pac. 445; *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90; *Muldoon v. Lynch*, 66 Cal. 536, 6 Pac. 417; *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959; *Vath v. Hallett*, 31 Cal. App. 290, 160 Pac. 1065.

12. *Streeter v. Rush*, 25 Cal. 67 (stating the rules generally); *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667 (where a stipulation in a

bond given to secure the payment of rents and performance of covenants of a lease, was construed as providing for a penalty). See *Ricketson v. Richardson*, 19 Cal. 330, holding that a bond in a penal sum equal to one dollar an acre for land conveyed by an accompanying deed to the obligor, the effect of the transaction being that the obligor agrees to resell the land within one year for not less than one dollar per acre, which is to be paid to the obligee, any excess to be divided between the parties, and if no sale is made the land to be reconveyed to the obligee, provides for a penalty and not for liquidated damages, and the obligee's claim under it is for unliquidated damages. And see *Nash v. Hermosilla*, 9 Cal. 584, 70 Am.

the damage covenanted against in a fixed sum is wholly uncertain and incapable of estimation, the gross sum will ordinarily be regarded as liquidated damages.¹³

“The tendency and preference of the law is to regard a stated sum as a penalty, except where the actual damages cannot be ascertained by any standard. But where the damages which must result from a breach of a single contract are uncertain in their nature, any stipulation which the parties may make ostensibly for the purpose of liquidating the damages should receive favorable consideration.”¹⁴

But if the character of the contract is such that the sum agreed to be paid for its breach could be nothing else than a penalty, the mere fact that the amount of actual damage would be difficult or impossible to ascertain will not validate the provision.¹⁵ Where the sum stipulated is reasonably proportionate to the actual damage, it would formerly have been treated as a valid estimate of

Dec. 676, holding that an agreement to erect a brick building to cover such portion of a lot as would be satisfactory to the tenant, to give him possession within three weeks, his possession to be for six months with the privilege of twelve months or more, and in case of failure to pay five hundred dollars, provides for a penalty and not liquidated damages, in view of the numerous omissions which might constitute a violation and the failure to declare the sum named liquidable damages.

It seems that a provision forfeiting an insurance policy for non-payment of a premium installment which the company retains the right to collect is void as a penalty. *Kelly v. Great Western Acc. Ins. Co.*, 31 Cal. App. Dec. 927, 189 Pac. 785.

13. *Streeter v. Rush*, 25 Cal. 67;

People v. Love, 19 Cal. 676; *Fisk v. Fowler*, 10 Cal. 512; *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959.

A stipulation in a contract for the hiring of a lighter, that should the lighter be lost or damaged to the extent that it cannot be put in the same good condition as when received by the hirer, he agrees to pay a fixed sum to the lender, is a stipulation for liquidated damages and not a penalty, the damage contemplated being such as would be equivalent to a total loss, so that no marked disparity exists between the alternative conditions of payment and the sum stipulated. *Wilmington Trans. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705.

14. *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90.

15. *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707.

liquidated damages. But the provisions of the Civil Code¹⁶ have now narrowed the field of validity, even in the case of liquidated damages, to instances where it would be impracticable or extremely difficult to fix the actual damages.¹⁷

§ 97. Stipulation of Same Sum for Different Breaches. Since liquidated damages are agreed on by the parties with a view to the amount of injury sustained, it follows that where a fixed sum is covenanted to be paid for any one of several breaches of the contract, of varying importance and differing widely in injuriousness, the inference arises that a penalty was intended and not liquidated damages.¹⁸ All the more so, where the sum is made payable for one breach or for many, or for a breach attended with a small loss or a great loss, and where the actual damages are easily computed. In such cases, the inequality is at once seen, and the sum stipulated cannot possibly be adjusted to recompense the actual injury.¹⁹ It has been held though that this rule has been modified by sections 1670 and 1671 of the Civil Code,²⁰ nullifying stipulations for liquidated damages except where it would be impracticable or extremely difficult to fix the actual damages; so that though, under the older rule, the stipulation in such a case might have been deemed a penalty, it must now be enforced under the exception of the statute.¹

16. Civ. Code, §§ 1670, 1671. See *infra*, § 110.

17. *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959.

18. *Wilmington Trans. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705 (holding this circumstance significant when the intention was otherwise doubtful); *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90; *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676; *Vath v. Hallett*, 31

Cal. App. 290, 160 Pac. 1065. 'And see *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295, for a general statement of the rule.

19. *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90.

20. See *infra*, § 110.

1. *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295. But see *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667,

§ 98. Stipulations Against Delay in Performance.—If the sum to be paid for delay in the performance of a contract is apportioned to the delay, it is to be regarded as liquidated damages.² Thus a provision in an oil lease for the payment of a certain sum per month for delay in beginning operations is not invalid as a penalty.³ But a contract which provides a definite period within which the work shall be completed, “under forfeiture of ten dollars per day for each and every day beyond the stated time for completion,” provides for a penalty and not liquidated damages, both because of the absence of actual monetary damage, and because the word “forfeiture” imports a penalty.⁴ Whether the agreement to pay a fixed sum for the violation of a covenant to purchase all supplies of a single wholesaler for a given period of time provides for liquidated damages or for a penalty must, in view of the condition of the authorities, be regarded as in doubt. In an early case the supreme court held such an agreement valid, as one for liquidated damages.⁵ In a recent case the court of appeals has held it void as a penalty, the sum to be paid not being apportioned to the continuance of the default.⁶

§ 99. Trade Agreements.—Where the agreement is not to carry on a trade or business at a particular place, the sum stated must be taken as liquidated damages.⁷ A pro-

discussing the rule as stated above and explaining the holding in *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, supra.

2. *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676. And see *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890, where such a stipulation in a building contract was regarded as one for liquidated damages.

3. *Allen v. Narver*, 178 Cal. 202, 172 Pac. 980. See *infra*, § 104, as to validity of stipulation for liquidated damages in leases.

4. *Muldoon v. Lynch*, 86 Cal. 536, 6 Pac. 417.

5. *Lightner v. Menzel*, 35 Cal. 452.

6. *Vath v. Hallett*, 31 Cal. App. 290, 160 Pac. 1065.

7. *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388 (when the term “liquidated damages” was used in the contract); *Streeter v. Rush*, 25 Cal. 67; *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676. See *infra*, § 103, as to validity of agreement.

vision whereby members of an incorporated fruit-growers association designed to enforce co-operative marketing are to pay a certain sum per box on all fruit marketed outside the association, has been held to be enforceable as a valid agreement for payment of liquidated damages, it appearing that the association would sustain some actual damage from such a contract, which would be impracticable or extremely difficult to fix.⁸ So where, under a contract, certain employers agree to act together along certain lines in dealing with their employees, and to create a fund by contributions based on the relative amount of business done by each, which shall be distributed among those keeping the agreement in proportion to their initial contributions, it has been held that such contract shows an intent to estimate a just compensation for a breach, and, though the word "penalty" be used in describing the purpose of the fund, that it provides for liquidated damages and not a penalty.⁹ But an agreement between farmers to market their produce at a certain market, and to execute each a note for a specified sum to become due in case the maker takes his produce to another market, provides for a penalty rather than liquidated damages, and the notes given under it are not enforceable.¹⁰

Validity of Agreement for Liquidated Damages.

§ 100. Statutory Provisions.—The Civil Code declares that

"Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."¹¹

8. *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959.

9. *Dyer Bros. etc. Works v. Cen-*

tral Iron Works, 182 Cal. 588, 189 Pac. 445.

10. *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707.

11. Civ. Code, § 1670.

“The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”¹²

It has been said that these sections announce no new principle of law in California. They were intended to secure a just compensation for injuries, where they could be readily ascertained, and to protect parties in those cases from improvident contracts. They were not intended, nor is it the policy of the law, to force a construction of a contract that will assign it to the prohibited class and thereby defraud a party of the benefit of an agreement he has taken to secure him against loss.¹³ But it is also true that these statutory enactments have narrowed the field of validity by not allowing the enforcement of the provision for payment of a fixed sum on a breach, except where from the nature of the case it would be impracticable or extremely difficult to fix actual damages, while before their adoption such a provision might also have been sustained where the amount fixed was reasonably proportionate to the actual damage suffered.¹⁴

§ 101. Determination of Validity.—Whether it would be “impracticable or extremely difficult to fix the actual damage,” so as to bring the case within the exception of section 1671 of the Civil Code,¹⁵ is a question of fact.¹⁶ It

12. Civ. Code, § 1671.

13. *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667.

14. *Anaheim Citrus Fruit Assn. v. Yeoman*, 34 Cal. App. Dec. 798, 197 Pac. 959.

15. See *supra*, § 110.

16. *Dyer Bros. etc. Works v. Central Iron Works*, 182 Cal. 588, 189 Pac. 445; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 67 Pac.

499; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Consolidated Lumber Co. v. Los Angeles*, 33 Cal. App. 698, 166 Pac. 385; *City of Los Angeles v. Shafer*, 35 Cal. App. Dec. 605, 200 Pac. 384 (holding that the court was in error in assuming that it was a question of law as to whether it would be impracticable or extremely difficult to fix actual damages in a case in which the parties

is to be determined by the court in each particular case by examining the attendant circumstances under which the contract was entered into, as well as the terms of the contract itself.¹⁷

Effect of recitals in contract.—Parties cannot, by their arbitrary agreement that it is impracticable or extremely difficult to ascertain such damages, preclude such an examination by the court, or evade the provisions of the statute.¹⁸ But a specific declaration made in the contract itself that damages arising from its breach would be difficult to ascertain and that the parties are making provision for liquidated damages accordingly, tends strongly to establish the fact required by statute to exist. And where there is nothing in the findings to negative that statement, it is conclusive on appeal.¹⁹

Burden of proof.—The burden is upon the party seeking to establish the validity of the provision under the exception allowed by the code, to show both by pleading and

have attempted to agree upon the liquidated damages in advance); *Stark v. Shemada*, 34 Cal. App. Dec. 867 (question as to whether or not it would be impracticable or extremely difficult to fix the actual damage arising from a breach of contract is always a question of fact); *McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867; *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823; *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295. See *infra*, § 120, as to findings, and *infra*, § 126, as to sufficiency of allegation that actual damages are impracticable or extremely difficult to fix.

17. *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867.

18. *Knight v. Marks*, 183 Cal. 354, 191 Pac. 531; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867.

Even where the parties to the contract for liquidated damages have by written stipulation agreed that it would be impracticable and extremely difficult to fix the actual damages, if the facts do not support such stipulation it cannot be enforced. *Stark v. Shemada*, 63 Cal. Dec. 106, 204 Pac. 214; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890.

19. *Consolidated Lumber Co. v. Los Angeles*, 33 Cal. App. 698, 166 Pac. 385.

proof that the case is actually one in which actual damages would be impracticable or extremely difficult to fix.²⁰ Without an allegation bringing his case within the exception the pleading in that regard is insufficient, the presumption being, in the absence of such allegation, that the agreement is void.¹ But where it is perfectly obvious that damages resulting from a breach of contract will be impracticable or extremely difficult to fix, as in the case of the sale of the goodwill of a business, it is not necessary to plead or prove that fact.²

§ 102. Nature and Effect of Agreement—Contract Limiting Liability.—A stipulation for the payment of liquidated damages may be for the conveyance of certain specific property, as well as for the payment of a fixed sum of money.³ In order to recover on such a stipulation, there must have been a substantial breach of contract by the other party, amounting to more than a liability for mere nominal damages.⁴ The fact that a stipulation in a contract may be void under section 1670 of the Civil Code⁵ does not necessarily affect the validity of the balance of the contract.⁶ Nor does the fact that an agreement to

20. *Dyer Bros. etc. Works v. Central Iron Works*, 182 Cal. 588, 189 Pac. 445; *Green v. Frahm*, 176 Cal. 259, 168 Pac. 114; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Rez v. Summers*, 34 Cal. App. 527, 168 Pac. 156; *McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867; *Stephens v. Daugherty*, 33 Cal. App. 733, 166 Pac. 375; *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295; *Sherman v. Gray*, 11 Cal. App. 348, 104 Pac.

1004; *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162.

1. *Green v. Frahm*, 176 Cal. 259, 168 Pac. 114; *Long Beach etc. Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499; *McInerney v. Mack*, 34 Cal. App. 153, 166 Pac. 867; *Thomas v. Anthony*, 30 Cal. App. 217, 157 Pac. 823.

2. *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162. See *GOODWILL*.

3. *Pogue v. Kaweah etc. Co.*, 138 Cal. 664, 72 Pac. 144.

4. *Vath v. Hallett*, 31 Cal. App. 290, 160 Pac. 1065.

5. See *supra*, § 100.

6. *Los Angeles Olive Growers' Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 140 Pac. 295.

convey certain real estate as liquidated damages happens to be invalid render improper a decree that the deed to it, which has been deposited with a trustee, shall be delivered to the party injured as security.⁷ Where damages from breach of contract are relied on as a counterclaim, and the actual damages shown are sufficient to defeat plaintiff's recovery, the validity of a stipulation for liquidated damages which would have the same result becomes immaterial.⁸ It has been held that where a contract for the sale of a business binds the vendor not to engage in a like business within a specified distance of the location, and this radius includes portions of three counties so that the provision is void under sections 1673 and 1674, of the Civil Code as to the counties other than the one in which the business is carried on, the resumption of business by the vendor within the latter county nevertheless entitles the vendee to recover the full amount stipulated and he is not put to proof of his actual damage; for though the covenant is divisible as to territory, it is not apportionable as to liquidated damages, any violation entitling the vendee, within the intent of the parties, to recover the full amount.⁹

Effect of contract limiting liability.—Stipulations by telegraph companies that their liability for delayed or erroneous transmission of messages shall not extend beyond the charges unless the sender orders the message repeated have been sustained, except in cases of willful misconduct or gross negligence. Apparently the validity of such stipulation under section 1670 of the Civil Code has not been raised.¹⁰ And common carriers are author-

7. Kirch v. Wattell, 40 Cal. App. 501, 181 Pac. 111.

8. Tatsuno v. Pedersen, 21 Cal. App. 585, 132 Pac. 608.

9. Franz v. Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466. See GOODWILL.

10. Redington v. Pacific P. T. Cable Co., 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; Hart v. Western Union Tel. Co., 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637. See TELEGRAPHS AND TELEPHONES.

ized by statute to stipulate for a limitation of their liability in the case of the shipment of goods,¹¹ it being provided, though, that common carriers cannot exonerate themselves, by any agreement made in anticipation thereof, from liability for gross negligence, fraud or willful wrong of himself or his servants.¹²

§ 103. General Illustrations — Invalid stipulations.— Under the rule that the validity of a stipulation for the payment of liquidated damages turns on the question whether it is impracticable or extremely difficult to ascertain the actual damages,¹³ it has been held that a provision in a contract for the sale of personalty that the seller may retain a deposit made by the purchaser, in case the balance of the purchase money is not paid, is void as an attempt to liquidate damages in an unauthorized case.¹⁴ And the same is true for breaches of contract of sales of personal property generally, whether such sales were to have been effected directly or through an agent.¹⁵ Other instances where stipulations as to liquidated damages have been held void for like reason relate to damages resulting from the breach of a warranty of the fitness of a machine

11. See Civ. Code, §§ 2174, 2175. See CARRIERS, vol. 4, p. 873.

12. See Civ. Code, § 2175.

13. Civ. Code, §§ 1670, 1671. See supra, § 100.

14. Biescar v. Pratt, 4 Cal. App. 288, 87 Pac. 1101 (holding that the doctrine of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713, has no application to an agreement to sell personal property). See infra, § 105, as to the rule in cases involving contracts for the sale of real estate.

15. Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27

Pac. 36 (damages arising from a breach by the principal of a contract for the exclusive agency for the sale of a certain commodity on commission); McInerney v. Mack, 34 Cal. App. 153, 166 Pac. 867 (involving contract for services of a real estate broker); Thomas v. Anthony, 30 Cal. App. 217, 157 Pac. 823 (damages to a principal from the failure of an agent for the sale of motor-cars to undertake the agency). See note, 9 A. L. R. 1481, as to effect of provision for liquidated damages or penalty on enforceability of restrictive covenants in contracts of employment.

to do certain work;¹⁶ or damages arising from the loss or injury to a machine;¹⁷ or damages from the excessive removal of earth from a lot, from the failure to cover it with clay soil as agreed, and from failure to bring it to street grade;¹⁸ or damages arising from the breach of a tenant's covenants in certain leases;¹⁹ or damages arising from the breach of a contract to purchase real property.²⁰ And a stipulation in a promissory note fixing a definite amount as attorney's fees to be recovered in the event of suit for nonpayment is unenforceable, since it is neither impracticable nor extremely difficult to ascertain the value of the attorney's services.¹

Valid stipulations.—Where a party agrees to deliver specific personal property to the amount of a fixed sum, and fails to do so, the sum so fixed will be treated as liquidated damages.² Likewise, where one agrees to accept a stipulated sum for its cancellation, and the other party accepts the proposal and agrees to pay the sum named, such sum becomes liquidated damages, and fixes the amount of the first party's recovery for failure to fulfill the contract.³ Damages for the breach of a construction contract are to be ascertained by ordinary rules, though the contract provides for repairs or rebuilding during a fixed period after construction, or, in the alternative, a proportionate return of installments paid, the measure of damages fixed by the contract having reference only to the guaranty of maintenance for such period.⁴

The damages for breach of contract for the purchase of the goodwill of an established trade or business are so

16. *Greenleaf v. Stockton etc. H. & Agr. Works*, 78 Cal. 606, 21 Pac. 369.

17. *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705 (contract for a lighter).

18. *Sherman v. Gray*, 11 Cal. App. 343, 104 Pac. 1004.

19. See *infra*, § 104.

20. See *infra*, § 105.

1. *Eastman v. Sunset Park Land Co.*, 35 Cal. App. 628, 170 Pac. 642.

2. *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58.

3. *Cochran v. Jewell*, 71 Cal. 509, 12 Pac. 510.

4. *Reedy v. Smith*, 42 Cal. 245.

absolutely uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages.⁵

Contracts not subject to the rule.—A stipulation in a promissory note that, if not paid at maturity, it shall bear an increased rate of interest from its date, is not a stipulation for liquidated damages, void under section 1670 of the Civil Code.⁶ And where a contract was made for the packing of a specified quantity of fruit, the owner to pay the packer a stipulated sum per ton for any shortage in the amount, the packer's plant to be devoted exclusively to the work, it was held that this was not a stipulation for liquidated damages, but merely for a minimum compensation to the packer for his employment during the time covered by the contract.⁷ So a promise to pay a minimum sum for a commodity at a fixed rate, the amount to become due whether enough of the commodity to equal the minimum at the agreed rate is taken or not, is a part of the direct obligation of the contract, and in no sense a covenant for liquidated damages in case of breach.⁸

§ 104. Covenants in Leases.—There is no presumption that the amount of damages arising from a tenant's breach of covenant to pay rent is impossible or extremely difficult to fix.⁹ Hence, a provision for payment of liquidated damages in such a case is void.¹⁰ Damages to the lessor from the tenant's eviction for nonpayment of rent does not change the rule nor validate the provision. The invalidity

5. *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388; *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162. See *supra*, § 99, as to trade agreements. See SALES.

6. *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004.

7. *A. B. Field & Co. v. Haven*, 36 Cal. App. 669, 173 Pac. 108.

8. *Marin Water etc. Co. v. Town of Sausalito*, 168 Cal. 587, 143 Pac. 767.

9. *Rez v. Summers*, 34 Cal. App. 527, 168 Pac. 156.

10. *Knight v. Marks*, 183 Cal. 354, 191 Pac. 531; *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130.

of such a provision extends to a guaranty made by a third person for the payment of such liquidated damages, and to a mortgage given to him by the lessee to indemnify him upon such guaranty.¹¹ An agreement that a deposit made by a lessee to secure payment of rent and performance of other conditions of the lease, shall be forfeited in case of a breach, is void, whether viewed as a penalty, or as a provision for liquidated damages, the actual damage from a breach being neither impracticable nor extremely difficult to fix.¹² And where the lease provides that on its forfeiture the deposit shall become the lessor's money without affecting his right to damages, the lessee may recover the deposit, unless it appears that the lessor's actual damage cannot be ascertained with reasonable definiteness.¹³

In a case where the state leased a prison, together with the labor of the convicts, for a certain period, covenanting to pay the lessee a fixed sum per month, in consideration of which the lessee was to erect buildings on the prison grounds, and also relinquished certain claims against the state, it was held that the contract was incapable of apportionment, and on a breach by the state that the lessee was entitled to recover the sum agreed to be paid each month, as a measure of damages fixed by the contract itself.¹⁴

Oil leases.—Agreements in oil leases for the payment of stipulated sums, monthly or otherwise, for delay in beginning operations, or for failure to develop the property in a fixed time, are valid, in view of the extreme difficulty of ascertaining actual damages.¹⁵

11. *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130.

12. *Green v. Frahm*, 176 Cal. 259, 168 Pac. 114.

13. *Parish v. Studebaker*, 34 Cal. App. Dec. 193, 195 Pac. 721.

14. *People v. Brooks*, 16 Cal. 11.

15. *Allen v. Narver*, 178 Cal. 202, 172 Pac. 980; *McComber v. Keller-*

man, 162 Cal. 749, 124 Pac. 431; *Escondido Oil etc. Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040 (extending the rule to a stipulation for the payment by a sublessee on violation of an agreement to develop property in given time in order to protect sublessor's interests in the property). See OIL AND GAS.

"It would seem that damages for breaches of contracts touching future interests in oil wells of unknown value are of such remote and speculative character as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement."¹⁶

§ 105. Contracts Involving Transactions in Real Estate.

A stipulation in a contract for the sale of real estate that purchase money paid shall be retained by the vendor, in case of breach by the vendee, as liquidated damages, is void, the actual damages not being impracticable or extremely difficult to fix.¹⁷ But where, upon a breach by the vendee, the vendor is entitled upon other principles to retain any of the purchase money already paid, the invalidity is of no moment. And where the breach by the vendee is of some act not thus readily to be measured, stipulated damages will be allowed the vendor.¹⁸

But the rule is otherwise where the stipulation for liquidated damages protects against a breach by the vendor. In such a case it is presumed that monetary damages are an inadequate recompense for the loss of the land. And this presumption, declared by section 3387 of the Civil Code, presents the precise reason why liquidated damages are countenanced by section 1671 of that code. Section 3389, providing that though damages may be liquidated specific performance may be decreed, also recognizes the propriety of such stipulations in contracts of this character.¹⁹ A stipulation, however, fixing a certain

16. *Escondido Oil etc. Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040 (per McFarland, J.).

17. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749 (pointing out that the

measure of damages in such a case is fixed by Civ. Code, § 3307).

18. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713.

19. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Aikman v. Sanborn*, 5 Cal. Unrep. 961, 52 Pac. 729.

sum to be paid monthly by the vendor during the time the vendee is kept from possession is void, there being no difficulty in fixing the actual damage sustained by being deprived of the use of land, which is, ordinarily, the value of the use and occupation.²⁰ Where, in consideration of a conveyance of the equity of redemption in mortgaged premises, a party agrees that on foreclosure no personal judgment shall be entered against the mortgagor, it has been held that this amounts to a liquidation of the value of the equity in such amount as a personal judgment against the mortgagor might call for, and on the entry of such a judgment, the mortgagor may recover its amount from the party whose covenant is thereby violated.¹

VII. EXEMPLARY DAMAGES.

§ 106. In General.—The liability of persons, guilty of the commission of torts, to punitive damages, is thus declared by the Civil Code:

“In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”²

20. *Eva v. McMahon*, 77 Cal. 467, 19 Pac. 872. See *Stevens v. Los Angeles Dock etc. Co.*, 20 Cal. App. 743, 130 Pac. 197, holding that an agreement in a contract for the sale of real estate on deferred payments to the effect that the last payment should not be required unless certain improvements were made by the vendor within a stipulated time, is not a stipulation either for a penalty or for liquidated damages, but is rather a contract to sell unimproved land at a certain price,

with the option in the seller to improve it and charge a certain higher price.

1. *Banfield v. Marks*, 56 Cal. 185.

2. Civ. Code, § 3294.

The decisions of the various states present conflicting theories upon which exemplary damages are allowable. In California it is not a question of theory, but of express statutory provision.

Compensatory damages, except where otherwise expressly provided by law, are declared to be exclusive

A change in the phraseology of this code section was made in 1905 whereby the then existing phrase, "malice, actual or presumed," was supplanted by the present expression, "malice, express or implied," this alteration, however, seems not to have changed the rule that only actual malice, or malice in fact, will justify the imposition of exemplary damages.³

Provisions for the imposition of penal damages in special cases, in double, treble and even greater multiples of actual damage, are numerous in the California statutes. They include double damages for causing the arrest of one attending court as a witness;⁴ for the act of a personal representative in fraudulently selling land of a decedent;⁵ for embezzling or fraudulently disposing of the assets of an estate;⁶ and for the failure of one finding lost goods to comply with the statutory formalities, or to return them to the owner.⁷ Treble damages are provided for negligently setting fires;⁸ for cutting down or carrying away timber, or injuring trees,⁹ or committing waste;¹⁰ for the refusal of a sheriff to pay over the kind of money collected;¹¹ for the receipt of usury;¹² for injuring or failing to return books to the state library;¹³ for leaving open a gate on a public highway or unnecessarily riding over adjoining land;¹⁴ for forcible entry or unlawful detainer;¹⁵

(See "Erratum",
1924 Supp. 660)

of exemplary damages and interest.
Civ. Code, § 3357.

3. Davis v. Hearst, 160 Cal. 143,
116 Pac. 530. See infra, § 107, as
to the nature and necessity of
malice.

4. Code Civ. Proc., § 2068. See
WITNESSES.

5. Code Civ. Proc., § 1572. See
EXECUTORS AND ADMINISTRATORS.

6. Code Civ. Proc., § 1458. See
EXECUTORS AND ADMINISTRATORS.

7. Civ. Code, § 1871. See LOST
PROPERTY.

8. Pol. Code, § 3344; Civ. Code,
§ 3346a. See FIRES.

9. Code Civ. Proc., ^{Sec. 733; Civ. Code Sec. 3346}
~~§§ 732, 3346~~
See TRESPASS.

10. Code Civ. Proc., § 732. See
WASTE.

11. Code Civ. Proc., § 682, subd. 4.
See SHERIFFS AND CONSTABLES.

12. Stats. 1919, p. lxxxiii, § 3. Act
1675, Gen. Laws Supp., p. 1257.
See USURY.

13. Pol. Code, §§ 2298, 2299.

14. Pol. Code, § 2736. See HIGH-
WAYS.

15. Code Civ. Proc., §§ 735, 1174;
Civ. Code, §§ 3344, 3345. See
FORCIBLE ENTRY AND DETAINER.

and for excessive charges by an innkeeper.¹⁶ A sheriff's failure to pay over money is visited by twenty-five per cent damages.¹⁷ Appeals in judicial proceedings, made for delay, are punished by such damages "as may be just."¹⁸ And it is prescribed that the willful injury of telegraph or telephone property subjects the offender to one hundred times the actual damage.¹⁹ Exemplary damages are also specifically authorized by statute for injuries to animals.²⁰ And such damages are also allowable in cases for seduction;¹ or for an oppressive or malicious assault upon the person;² or, where actual malice is shown, in libel,³ or slander.⁴ The foregoing summary takes no

16. Civ. Code, § 1863. See INN-KEEPERS.

17. Pol. Code, § 4162. See SHERIFFS AND CONSTABLES.

18. Code Civ. Proc., §§ 957, 980. See COSTS, vol. 7, p. 318.

19. Civ. Code, § 538. See TELE-GRAPHS AND TELEPHONES.

20. Civ. Code, § 3340.

1. Code Civ. Proc., § 374; *Marshall v. Taylor*, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867. See note, 16 A. L. R. 1316, as to punitive or exemplary damages in action for alienation of affections or criminal conversation.

2. *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Wade v. Thayer*, 40 Cal. 578; *Ehat v. Scheidt*, 17 Cal. App. 430, 120 Pac. 49.

But not where the circumstances repel the inference of deliberate intent to harm. *Badostain v. Graziade*, 115 Cal. 425, 47 Pac. 118. See *supra*, § 47, as to mitigation of exemplary damages for assault. And, generally, see ASSAULT AND BATTERY, vol. 3, p. 192 et seq.; and note, 16 A. L. R. 771.

3. *Graybill v. De Young*, 140 Cal. 323, 73 Pac. 1067; *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499; *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958; *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Childers v. Mercury P. & P. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903.

But where there is no malice in fact, punitive damages cannot be awarded. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530 (where the absence of a defendant from the state and want of foreknowledge of particular libelous articles, negated malice); *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576; *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Wilson v. Fitch*, 41 Cal. 363. See *supra*, § 107, as to necessity for showing of malice generally.

4. *Wright v. Baldwin*, 31 Cal. App. Dec. 1111, 190 Pac. 377; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845.

account of statutory penalties,—a subject treated elsewhere in this work.⁵

Theory of punitive damages.—Punitive damages have no compensatory character. They amount only to a punishment or fine which the law says ought to be imposed in certain cases,⁶ and which, it has been observed, is somewhat in analogy to the action of *qui tam*, goes to the party who has been injured and has brought the suit.⁷

§ 107. Evil Motive or Intent as a Factor Generally.—In all classes and kinds of cases in which exemplary damages are sanctioned, there must be made to appear to the satisfaction of the jury the evil motive, the *animus malus*, shown by malice in fact or by its allied malign traits and characteristics evidenced by fraud or oppression.⁸ It is the wrongful personal intention to injure that calls forth the penalty of punitive damages. This is necessarily so, for the wrongful act having been fully compensated for by actual damages, there remains but the improper motive, which may be punished by exemplary damages.⁹ Hence, though actual damages are not diminished or increased by the character of the motives which actuated the wrongdoer, for the purpose of determining whether punitive damages shall be allowed the motive or intention with which the act was done becomes important.¹⁰ In order to decide the fact and amount of such damages, the jury should know

5. See PENALTIES.

6. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325. See *infra*, § 120, as to segregation of amounts of compensatory and punitive damages in verdict and finding.

7. *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325 (per Hart, J.); *Plotnick v. Rosenberg*, 36 Cal. App. Dec. 831, 203 Pac. 413.

8. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530. And cases cited *infra* and see *infra*, § 108. See *infra*, § 119, as to determination of evil motive being for the jury.

9. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

10. *Walker v. Chanslor*, 153 Cal. 118, 94 Pac. 606; *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56; *Lyon v. Hancock*, 35 Cal. 372.

whether the defendant acted under an honest claim of right, or merely from a mischievous and malicious intent to injure.¹¹ Under section 3294 of the Civil Code,¹² the amount of punitive damages is not confined to cases in which malice on the part of the defendant appears, but includes instances of fraud and oppression as well.¹³ And there must be some evidence of one or the other of these elements to justify the jury in making the award.¹⁴ It follows that a tort committed by mistake, in the assertion of a supposed right, or without any wrong intention, and without such recklessness as evinces malice or a conscious disregard of the rights of others, does not warrant punitive damages.¹⁵

§ 108. Malice in Fact Distinguished from Malice in Law. Damages of an exemplary character can be given only upon a showing of malice in fact as distinguished from malice in law.¹⁶ The malice, and the only malice, contemplated by section 3294 of the Civil Code is malice in fact; the phrase "express or implied" having reference only to the evidence by which that malice is established,—express malice thus meaning that the malice is established by express or direct evidence going to prove the actual existence of the hatred and ill will, implied malice referring to the indirect evidence from which the jury may infer the existence of the malice in fact.¹⁷ While the mal-

11. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161.

12. See *supra*, § 106.

13. *St. Ores v. McGlashen*, 74 Cal. 148, 15 Pac. 452.

The "oppression" which, under the statute, justifies an award of punitive damages, is "the act of subjecting to cruel and unjust hardships." *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 Pac. 851.

14. See *infra*, § 141, as to evidence of exemplary damages; *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024.

15. *Lyles v. Perrin*, 119 Cal. 264, 51 Pac. 332.

16. *Walker v. Chanslor*, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606.

17. *Wright v. Baldwin*, 31 Cal. App. Dec. 1111, 190 Pac. 377; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Scrivani v. Dondero*, 128 Cal.

ice essential to a recovery of punitive damages is sometimes called "express malice," sometimes "actual malice," sometimes "real malice," and sometimes "true malice," it is always in its analysis malice of the one kind,—the malice of evil motive.¹⁸ And such malice as is required to sustain a recovery of punitive damages must be found by the jury. It cannot be presumed by the court.¹⁹

§ 109. Allowance in Discretion of Jury—Province of Court.—As a general rule, the granting or withholding of punitive damages is wholly within the discretion of the jury.²⁰ And upon such question juries have a wider discretion than in the case of compensatory damages.¹ Even after establishing a case where punitive damages are permissible, a plaintiff is never entitled, as a matter of right, to recover them, and hence it has been held that an instruction that he is so entitled is erroneous.² While it

31, 60 Pac. 463; Childers v. San Jose Mercury P. & P. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903 (construing the phrase "actual or presumed," which then stood in place of "express or implied," now used in the statute. See *supra*, § 106). See *infra*, § 141, as to admissibility of evidence, and *infra*, § 142, as to sufficiency of evidence.

18. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

19. *Wright v. Baldwin*, 31 Cal. App. Dec. 1111, 190 Pac. 377. See *supra*, § 121, as to province of jury; and *infra*, § 132, as to presumption and burden of proof or malice.

20. *Lewis v. Harris*, 165 Cal. 527, Ann. Cas. 1914D, 148, 132 Pac. 1022; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290.

In some of the early cases it seems that the proof of circum-

stances which would warrant the recovery of punitive damages was regarded as conferring on the jury a wider discretion in awarding collateral or consequential damages, or in taking the entire award peculiarly into their own hands. *Dorsey v. Manlove*, 14 Cal. 553; *Phelps v. Owens*, 11 Cal. 22; *Townsend v. Briggs*, 3 Cal. Unrep. 803, 32 Pac. 307; *Treesh v. Stone*, 34 Cal. App. Dec. 759, 197 Pac. 425. But see *Plotnik v. Rosenberg*, 36 Cal. App. Dec. 831, 203 Pac. 413, and the holding therein that the authority of the jury is nevertheless subject to the rule that the verdict may be set aside for excessiveness.

1. *Scott v. Times-Mirror Co.*, 181 Cal. 345, 12 A. L. R. 1007, 184 Pac. 672. See *infra*, § 58, as to inclusion of expenses of litigation in exemplary damages.

2. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

is true that there is no fixed rule as to the proportion between actual and exemplary damages in cases where exemplary damages are recoverable, it has been held that exemplary damages should bear a reasonable proportion to the actual damages sustained and that the discretion of the jury is not unlimited in this matter; in other words, the power of the court to set aside a verdict for exemplary damages is the same power, and is exercised upon the same principle as in any case of excessive verdict. Where the proceeding is tried without a jury certain of the statutes prescribe that the court may in its discretion award exemplary damages.³ It has been held, construing such a statute, that the power to treble actual damages by way of punishment for forcible entry or detainer of real property, which the court is authorized to exercise by sections 1174 and 735 of the Code of Civil Procedure, precludes the allowance of exemplary damages by the jury. The function of the jury in such cases is confined to the ascertainment of actual damages, and the only method of punishment is through the trebling of such damages, in the discretion of the court.⁴

§ 110. Existence and Effect of Other Remedy.—The fact that a defendant has been,⁵ or may be,⁶ punished criminally, does not preclude an award of exemplary damages against him in a civil action. On the other hand, the mere fact that a defendant may be liable to criminal prosecution does not make him ipso facto liable to exemplary damages. Whether he is so liable depends upon the mitigating circumstances shown in evidence, tending in some measure to palliate his offense.⁷ The fact that

3. *Thompson v. Modern School*, 183 Cal. 112, 190 Pac. 451.

4. *San Francisco etc. Soc. v. Leonard*, 17 Cal. App. 254, 119 Pac. 405. See **FORCIBLE ENTRY AND DETAINER**.

5. *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668.

6. *Wilson v. Middleton*, 2 Cal. 54.

7. *Badostain v. Grazide*, 115 Cal. 425, 47 Pac. 118.

Though the tort be also a crime, a preponderance of the evidence is

his wrong may be visited by a statutory penalty does not save him from exemplary damages, where the circumstances of the case show such malice or oppression as to warrant them.⁸ This has been so held with regard to the penalty imposed by the act of 1893,⁹ for wrongfully excluding one from a place of amusement,¹⁰ and with regard to the penalty fixed by sections 51 and 52 of the Civil Code for the denial of equal accommodations in hotels and other public places.¹¹ The reason is that statutory penalties are imposed whether the defendant's act was occasioned by evil motives or not. The imposition of a penalty does not, therefore, exclude the operation of the statute allowing exemplary damages for acts done with malice, or characterized by fraud or oppression.¹² So a statute prescribing a liability in actual damages for a refusal to furnish irrigating water¹³ does not preclude the allowance, in addition, of punitive damages, the obligation to furnish the water being of constitutional origin.¹⁴

§ 111. Persons Liable in General—Joint Tort-feasors.—

In general, any person who may be charged with actual damages for a tort may also be held, in a proper case, to the payment of exemplary damages.¹⁵ A corporation may be rendered guilty of malice or oppression and thus sub-

all that is necessary to support a finding of malice warranting the recovery of exemplary damages in a civil suit. *St. Ores v. McGlashen*, 74 Cal. 148, 15 Pac. 452.

8. *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050; *Piluso v. Spencer*, 36 Cal. App. 416, 172 Pac. 412.

The fact that the plaintiff once trespassed against the defendant, does not preclude a recovery of exemplary damages. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161.

9. Stats. 1893, p. 220.

10. *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050. See *Civil Rights*, vol. 5, p. 130.

11. *Piluso v. Spencer*, 36 Cal. App. 416, 172 Pac. 412. See *Civil Rights*, vol. 5, p. 133.

12. *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050. See *Civ. Code*, § 3294. See *supra*, § 106.

13. Stats. 1885, p. 98.

14. *Lowe v. Yolo County etc. Water Co.*, 8 Cal. App. 167, 96 Pac. 379.

15. *Civ. Code*, § 3294. See *supra*, § 106.

jected to exemplary damages, by the acts of those whom it has placed in charge of its affairs and who constitute, for all purposes of dealing with others, the corporation.¹⁶ And public utilities violating any law, or decision of the railroad commission, are subjected by the Public Utilities Act to a special liability for exemplary damages, if the court shall find that the act or omission was "willful."¹⁷ Minors, and persons of unsound mind, are expressly exempted by statute from liability for exemplary damages, unless at the time of the act he who committed it was capable of knowing that it was unlawful.¹⁸

Recovery against joint tort-feasors.—Under the system of procedure in California, where the jury may, and upon the request of the defendant must, segregate its awards of compensatory and punitive damages, there is nothing to prevent the award of a single sum as compensatory damages against all joint tort-feasors found culpable, and the addition of another specific sum or sums by way of punitive damages against such of them as are found to have been actuated by malice in fact. Such a practice tends to simplicity and to avoidance of the multiplicity of actions which otherwise would be necessary. Particularly appropriate is it where punitive damages are sought against both principal and agent, and where the agent is found guilty of malice, fraud or oppression, but his improper motives are not chargeable against the principal.¹⁹ However, it has been held in a case where the defendants were sued jointly as joint tort-feasors, and a joint judgment was sought against them, exemplary damages were not allowable unless both defendants were found to have been guilty of the malice necessary to sustain such a recovery.

16. *Lowe v. Yolo County etc.* of principal in general for agent's Water Co., 157 Cal. 503, 108 Pac. acts.

297. See CORPORATIONS, vol. 7, pp. 18. Civ. Code, § 41.

84, 85.

17. Stats. 1915, p. 115, § 73 (a). 19. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530. See *infra*, § 112, as to liability of principal in general.

1415. See *infra*, § 112, as to liability

In such case it was held that if the jury believed that exemplary damages should be given against each defendant, but in different amounts, they might render a verdict for only the lowest amount.²⁰

§ 112. Liability of Employer for Employee's Acts.—

Though one may be liable for damages for the wanton and reckless acts of his subordinate in the discharge of the duties assigned him, the liability, in as far as it arises from the relation itself, is limited to compensatory damages only.¹ Inasmuch as an evil motive is essential as a factor in the allowance of exemplary damages,² it is obvious that an employer is not liable for such damages unless he either authorized the unlawful acts of the employee beforehand, or ratified them afterwards.³ Such ratification, it is said, presupposes original authorization,⁴ or operates as the equivalent of authorization.⁵

20. *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499.

1. *Warner v. Southern Pac. Co.*, 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187; *Wade v. Thayer*, 40 Cal. 578; *Kline v. Central Pac. R.R. Co.*, 37 Cal. 400, 99 Am. Dec. 282.

2. See *supra*, § 107.

3. *Lightner Mining Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Trabing v. California Nav. etc. Co.*, 121 Cal. 137, 53 Pac. 644; *Warner v. Southern Pac. Co.*, 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187 (disapproving dicta to the contrary in *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Wade v. Thayer*, 40 Cal. 578; *Turner v. North Beach & M. R. R. Co.*, 34 Cal. 594; *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec.

231. See *infra*, § 145, as to instructions.

4. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530 (holding that if a newspaper proprietor gives his subordinates carte blanche to do anything and everything to make the paper a financial success and demonstrate its superior enterprise, thus implying a willingness to publish libels, it would be such a general suggestion of such acts as to make him liable to exemplary damages).

5. *Edmunds v. Atchison etc. Ry. Co.*, 174 Cal. 246, 162 Pac. 1038; *Lightner Mining Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Foley v. Martin*, 143 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842; *Trabing v. California Nav. etc. Co.*, 121 Cal. 137, 53 Pac. 644; *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559; *Mendelsohn v. Anaheim*

“The entire basis of the doctrine of vindictive damages is that the person, himself, who is sued has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society, and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty.”⁶

The doctrine that the principal cannot be held in exemplary damages for his agent's act unless he authorized or ratified it, extends to fraud committed by the agent.⁷ And it extends to the official relation of a sheriff to his deputies, the sheriff not being liable to exemplary damages for the acts of his deputies solely on account of his official status, but only for authorization or ratification, like any other principal.⁸

§ 113. Breaches of Contract.—In general, exemplary damages for breach of contract are not recoverable,⁹ and

Lighter Co., 40 Cal. 657; Turner v. North Beach & M. R. R. Co., 34 Cal. 594.

The denial of the fraudulent acts of the agent by a principal in his answer, if made in good faith, cannot be regarded as a ratification. Lightner Mining Co. v. Lane, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771. As to acts constituting a ratification of unauthorized acts of an agent generally, see AGENCY, vol. 1, p. 770 et seq.

6. Warner v. Southern Pac. Co., 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187 (per McFarland, J.).

7. Lightner Mining Co. v. Lane, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771.

8. Foley v. Martin, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842; Nixon v. Rauer, 6 Cal. Unrep. 788, 66 Pac. 221. See SHERIFFS AND CONSTABLES.

9. Scurich v. Ryan, 14 Cal. App.

750, 113 Pac. 123 (holding that the act of the lessor of an orchard in excluding the lessee therefrom on the ground that the latter was violating the terms of the lease in not properly caring for the trees, though an invasion of the lessee's rights, is not inherently malicious or oppressive, and in the absence of evidence that it was so in fact, will not warrant punitive damages).

Where there is no evidence that a passenger ejected from a railroad train for nonpayment of fare was treated with force or violence, or otherwise than in a civil and gentle manner, there is no ground for the award of exemplary damages. Cox v. Los Angeles Terminal Ry., 109 Cal. 100, 41 Pac. 794. And the mere refusal to accept a colored person as a passenger on a street-car, no proof being given of malice, ill will or wanton or violent

this has been held to be the rule even though the breach complained of be willful. In this connection it has been said that "the rule as to damages in actions upon contract is the same whether the breach be by mistake, pure accident or inability to perform it, or whether it be willful and malicious; the motives of the party breaking the contract are not to be inquired into."¹⁰ Where, however, the action is not on the contract but is based on the fraud by which it was induced, the fact that the contract fixes the compensation does not prevent recovery of exemplary damages.¹¹ And where the breach also involves an infraction of a duty imposed by law it may be thus punished.¹² Thus, an action for wrongful refusal to supply irrigating water in violation of the constitutional obligation imposed on irrigating companies through the declaration that the use of all water for sale, rental or distribution shall be a public use subject to state control, is based on the constitutional obligation and not on contract, so that punitive damages for the refusal may, in a proper case, be allowed.¹³

conduct, does not present a case for exemplary damages. *Pleasants v. North Beach & M. R. R. Co.*, 34 Cal. 586. See *infra*, this section for the rule where the breach is accompanied by a violation of a duty imposed by law. See *CARRIERS*, vol. 4, p. 928.

10. *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275 (case arising in California and construing Cal. Civ. Code, § 3294, and quoting the rule generally as stated in *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356).

11. See *supra*, § 78, as to effect of fraud as oppression on measure of damages for breach of contract.

12. *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 33 Am. St. Rep. 157,

31 Pac. 1112; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657 (holding that a railroad company is liable for punitive damages for the wrongful expulsion of a passenger, if the attending circumstances warrant their imposition). But see *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231, holding that a passenger recklessly injured cannot recover exemplary damages against the carrier, as he is not the medium through which the rights and safety of the public can be asserted or maintained.

13. *Lowe v. Yolo County etc. Water Co.*, 157 Cal. 503, 108 Pac. 297; *S. C.*, 8 Cal. App. 167, 108 Pac. 297.

§ 114. Cases of Negligence.—Negligence, per se, necessarily implies an absence of intent or purpose. Hence mere negligence will not form a basis for the award of punitive damages.¹⁴ And, in view of the language of section 3294 of the Civil Code,¹⁵ limiting exemplary damages to cases of malice, fraud and oppression, even gross carelessness will not warrant the imposition of such damages.

“It cannot be said that an act of gross carelessness is always an act done through fraud, oppression, or malice, actual or presumed. The evidence showing the grossly careless act may reveal malice, actual or presumptive, or fraud, but it is not to be said that such malice, or oppression, or fraud, necessarily exists where ‘gross carelessness’ is shown.”¹⁶

The mere omission to repair damage unintentionally, though negligently, done, even after repeated requests, cannot be said to subject the injured person to cruel and unjust hardship, and hence is not such oppression as warrants the imposition of punitive damages.¹⁷

§ 115. Wrongful Death.—In the statutory action for death, exemplary damages are not allowed.¹⁸ The statute creating the right of action for wrongfully causing the death of another originally provided for an award of exemplary damages,¹⁹ and under this provision such dam-

14. *Davis v. Hearst*, 160 Cal. 142, 116 Pac. 530; *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231; *Moody v. McDonald*, 4 Cal. 297; *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 Pac. 851.

15. See *supra*, § 106.

16. *Yerian v. Linkletter*, 80 Cal. 135, 22 Pac. 70. But see *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325, intimating that “wanton carelessness” may justify exemplary damages.

17. *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 Pac. 851.

18. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303. See *DEATH*, post, § 64.

19. See act of April 26, 1862. Stats. 1862, p. 447, § 1.

ages could be given where death was caused by simple negligence.²⁰ But since the amendment of 1874 to section 377 of the Code of Civil Procedure, by which the clause allowing the recovery of exemplary damages was deleted, exemplary damages cannot be given in such an action, as the plaintiff cannot recover for any grievance personal to the deceased.¹

§ 116. Misuse of Legal Process or Procedure.—An officer who acts maliciously, even though under color of legal process, is liable to exemplary damages.² And where an officer, in attaching property, acts fairly and without malice, fraud or oppression, he is not so liable in such damages.³ But the fact that a party suing out and seeking to enforce legal process acts from malicious motives will not operate to charge the officer executing the writ with malice so as to subject him to exemplary damages, the motives of the one not being imputable to the other.⁴ It seems that exemplary damages may be recovered for the malicious suing out of a writ of attachment, where suit is brought on that ground, though they might not be recoverable for the taking and detention of property under the writ.⁵ And a criminal prosecution begun maliciously and without probable cause justifies the imposition

20. *Myers v. San Francisco*, 42 Cal. 215.

1. *Lang v. Schoettler*, 115 Cal. 388, 47 Pac. 139.

2. *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842 (where a deputy sheriff was guilty of such gross and willful oppression as to warrant the imposition of punitive damages); *Nightingale v. Scannell*, 18 Cal. 315. And see cases cited *infra*.

3. *Spooner v. Cody*, 5 Cal. Unrep. 357, 44 Pac. 1018.

4. *Nightingale v. Scannell*, 18 Cal. 315.

5. *McCusker v. Walker*, 77 Cal. 208, 19 Pac. 382.

In an action of malicious prosecution for wrongfully suing out and levying an attachment, where the plaintiff in the attachment suit is shown to have had no personal interest in the claim, but to have lent his name to others for the purpose of instituting harassing litigation of which he was to divide the fruits; a proper case is made out for the award of punitive damages. *Kinsey v. Wallace*, 36 Cal. 462. See ATTACHMENT, vol. 3, p. 555.

of exemplary damages.⁶ But where the circumstances are such as to indicate absence of malice in the issuance or service of process, the imposition of exemplary damages is not warranted.⁷

§ 117. Trespasses—Wrongful Taking of Personal Property.—Exemplary damages cannot be awarded for a simple trespass unaccompanied by malice, wrongful design or willful misconduct.⁸ But where a trespass is aggravated by circumstances of fraud, malice or oppression, or a reckless disregard of the rights of others, the jury are not confined to the loss or injury sustained, but may award punitive damages.⁹

Wrongful taking of personal property.—Under section 3294 of the Civil Code, exemplary damages may be awarded in an action to recover possession of specific chattels, as well as in an action for conversion.¹⁰ And a seizure of personal property, though under a claim of right, accompanied by a display of violence, or force, warrants the imposition of exemplary damages.¹¹ The same rule applies where circumstances of fraud are shown in the conversion,¹² or where the taking is attended by acts of oppression.¹³ But where the ownership of property taken by defendant is claimed by him in good faith,

6. *Russell v. Dennison*, 45 Cal. 337. See MALICIOUS PROSECUTION.

7. *Maher v. Wilson*, 139 Cal. 514, 73 Pac. 418; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93. See note, 4 A. L. R. 237, as to measure of damages for use of criminal process to collect debt.

8. *Lightner Mining Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93.

9. *Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506; *Waters v. Dernas*, 75 Cal. 563, 17 Pac. 685 (wanton and

malicious trespass); *Dorsey v. Manlove*, 14 Cal. 553. See TRESPASS.

10. *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656.

11. *Lathrop v. Golden*, 6 Cal. Unrep. 284, 57 Pac. 394.

12. *Gilbert v. Peck*, 162 Cal. 54, Ann. Cas. 1913C, 1349, 121 Pac. 315 (holding that the rule is not affected by the fact that possession of the property had been recovered under process of the court).

13. *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656.

and he acts without malice, and gains possession of the property peaceably, punitive damages are improperly assessed against him, though it is afterwards judicially determined that the taking amounted to a conversion.¹⁴ In a case where the trespass was the result of honest mistake and inadvertence, and where the property taken, i. e., ore from a mine, was of enhanced value by reason of its severance from the earth, and where it was mingled with ore belonging to the trespasser, it has been held that the allowance of such enhanced value cannot be justified as a punitive award under section 3294 of the Civil Code, in the absence of proof of oppression, fraud or malice.¹⁵

VIII. PROCEDURE.

In General.

§ 118. **Theory of Recovery.**—The principles pertaining to pleading and procedure in actions for damages are in the main the same as those which govern in actions generally, and these are considered in other articles of this work.¹⁶ Other matters more or less associated with the general subject of damages, and elsewhere considered in this work, include such as relate to the distinctions drawn between legal and equitable remedies, in that at law a party usually receives compensation in damages, while equity gives a more specific remedy according to the circumstances of the case;¹⁷ the character of the cause of action for damages as determined by the obligation upon which it is predicated—whether ex con-

14. *Abbott v. '76 Land & Water Co.*, 103 Cal. 607, 37 Pac. 527.

15. *Lightner Mining Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771. See **TROVER AND CONVERSION**

16. See **EVIDENCE; JUDGMENTS; PLEADING.**

17. See **ACTIONS**, vol. 1, p. 318; **EQUITY.**

In an early case it was held that a suit at law for the recovery of liquidated damages stipulated for in a partnership contract could not be maintained, the remedy being in equity for an accounting and dissolution. *Stone v. Fouse*, 3 Cal. 292. But see **COURTS**, vol. 7, p. 684, as to their jurisdiction under the reformed procedure.

tractu or ex delicto, or as based in both tort and contract;¹⁸ and, as a consequence of these matters, questions which pertain to joinder of causes,¹⁹ and joinder of parties.²⁰

Theory of recovery.—There is no rule of practice which prevents the parties to an action from trying the question of damages on any theory they see fit. They may adopt any rule which they deem proper, and courts will not interfere of their own motion to compel the adoption of a rule contrary to that which the litigants are satisfied to accept. Where they do adopt such a rule they are bound by it, and neither one will be subsequently permitted to question his own conduct relative to it.¹ No right is better established than that of a party to waive a recovery for damages, without regard to the purpose which may influence him. It is a privilege which is never denied, whether the waiver bear upon the jurisdiction of the court or otherwise.²

§ 119. Questions for Jury.—The amount of damages is, ordinarily, a question of fact, entirely within the province of the jury to determine.³ Especially is this true where

18. See ACTIONS, vol. 1, pp. 320, 321; TORTS.

19. See ACTIONS, vol. 1, p. 345.

20. See PARTIES; PLEADING.

1. *Durkee v. Chino Land & Water Co.*, 151 Cal. 561, 91 Pac. 389; *Kincaid v. Dunn*, 26 Cal. App. 686, 148 Pac. 235.

2. *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 413.

3. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708 (holding that whether the parties to a harvesting contract contemplated damage to ripe grain from shelling out due to customary high winds, was a matter for the jury); *Drake v. Palmer*, 4 Cal. 11; *Ah Thail v. Quan*

Wan, 3 Cal. 216; *Bartlett v. Hodge*, 3 Cal. 55 (involving an issue as to the amount of reasonable counsel fees recoverable); *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 353 (where damages are of a speculative or contingent character).

The amount of damages to be awarded to the plaintiff is committed to the unbiased judgment of the jury, and when it appears that that judgment has been fairly obtained, such judgment must govern, unless the damages awarded are so obviously disproportionate to the injury shown to have been sustained as to warrant the belief that the jury must have been influenced

the law furnishes no rule for their admeasurement.⁴ Not only is the amount of damages and the propriety of items included in it, usually for the jury, but the facts upon which the award is based necessarily fall within the province of the jury to determine.⁵ And where exemplary damages are sought, the existence of the fraud, malice, or oppression which would warrant them is always a question of fact for the jury to decide.⁶

§ 120. Verdict and Findings.—Courts may find damages in a lump sum, and any uncertainty in the findings will be construed to support the judgment rather than defeat it.⁷ Thus, where a complaint alleges various items of

by passion, partiality or prejudice, or misled by some mistaken view of the merits of the case. *Moreno v. Los Angeles Transfer Co.*, 44 Cal. App. 551, 186 Pac. 800. See *supra*, § 101, as to impracticability of fixing actual damages being a question of fact, in the determination of the validity of provision for liquidated damages.

4. *Aldrich v. Palmer*, 24 Cal. 513. See *supra*, § 65, as to award of damages for personal injuries being for the jury.

5. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320 (holding that whether humiliation and indignity suffered by plaintiff because of defendant's wrong, caused a nervous paroxysm and injury to physical health, is for the jury); *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997.

6. *Davis v. Hearst*, 160 Cal. 143, 118 Pac. 530; *Walker v. Chanslor*, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606; *Badostain v. Grazide*, 115 Cal. 425, 47 Pac. 118; *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024. See

supra, § 106, as to award of exemplary damages being for the jury.

7. *Ersine v. Marchant*, 37 Cal. App. 590, 174 Pac. 74. And see the following cases in which the findings were held to be sufficient: *Dean v. Hawes*, 29 Cal. App. 689, 157 Pac. 558 (finding held not vitally defective in failing to state that the value so found was market value); *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 Pac. 253; *McLaughlin v. McLaughlin*, 17 Cal. App. 699, 121 Pac. 704; *Griffin v. Pacific Electric Ry. Co.*, 1 Cal. App. 678, 82 Pac. 1084 (finding held to conform to the measure of damages prescribed by section 3333 of the Civil Code).

A finding for a greater amount of damages than the complaint avers is nevertheless a finding that plaintiff was damaged in the amount which he claims and will support a judgment for that amount. *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89; *Kerry v. Pacific Marine Supply Co.*, 6 Cal. Unrep. 118, 54 Pac. 262.

damage in named amounts and concludes with a general allegation of damages in their aggregate sum, a finding that plaintiff has sustained damages in a less sum will support a judgment in the absence of a request for a more specific finding, though it does not appear what elements of damage the court considered in reaching the judgment.⁸ However, a special finding, showing that part of the damages recovered consisted of special damages not pleaded, will control a general finding of damages in an aggregate sum.⁹ A finding of the facts constituting a breach of contract, but without any finding as to the amount of damage resulting therefrom, is insufficient to sustain a judgment.¹⁰

A verdict in favor of the plaintiff for the damages claimed in the complaint is a finding for him on all the material issues.¹¹ A defendant cannot complain because compensatory and punitive damages are not segregated in the verdict where he made no request for that form of verdict,¹² nor is it necessary for the trial court sitting as a jury, any more than for a jury, to make such segregation, unless requested.¹³ Where a verdict for damages ignores the admitted facts as to the amount of damages suffered, it may be set aside as unsupported by the evidence and contrary to law.¹⁴

8. *Murphy v. Stelling*, 8 Cal. App. 702, 97 Pac. 672.

9. *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53.

10. *Huelinger v. Big Sespe Oil Co.*, 28 Cal. App. 69, 151 Pac. 369.

See the following cases in which the findings were held to be insufficient or defective: *Rez v. Summers*, 34 Cal. App. 527, 168 Pac. 156 (finding held to be outside the issues); *Consolidated Lumber Co. v. City of Los Angeles*, 33 Cal. App. 698, 166 Pac. 385 (finding held not responsive to the pleadings). See *Quinn v. Anderson*, 70 Cal. 454,

11 Pac. 746, to the effect that where the court finds there is no liability, the omission to find on the issue of damages is immaterial.

11. *Koebig v. Southern Pac. Co.*, 108 Cal. 235, 41 Pac. 469.

12. *Bloomberg v. Laventhal*, 179 Cal. 616, 178 Pac. 496.

13. *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842. See *supra*, § 111, as to recovery of exemplary damages against one of several joint tortfeasors.

14. *Koebig v. Southern Pacific Co.*, 108 Cal. 235, 41 Pac. 469. See

§ 121. Judgment in General—Default Judgments.—A judgment for damages is not supported by a complaint which contains neither an express allegation of damages nor any statement of facts showing substantial damages.¹⁵ On the other hand, the fact that a plaintiff in his complaint claims damages beyond the just measure of his right, does not of itself invalidate his judgment, or warrant its reversal.¹⁶ But a judgment for damages in excess of the amount claimed is erroneous.¹⁷ The fact that the amount of lost profits was, at the rate alleged, less than the judgment awarded, does not invalidate the award, where damages were alleged generally in a larger sum, and loss of profits did not constitute the only element of damage.¹⁸ But a judgment erroneously given for the loss of future profits not pleaded, and not proved, cannot be sustained.¹⁹

Judgment by default.—In actions on contract for the recovery of money or damages only, where personal service has been had, the clerk of the court is authorized to enter judgment by default for the amount claimed.²⁰ In other actions, after default, application for judgment must be made to the court, which may order the damages to be

infra, § 130, as to admissions in the answer.

15. *Garstang v. Skinner*, 165 Cal. 721, 134 Pac. 329; *McKinlay v. Tuttle*, 42 Cal. 570; *Bohall v. Diller*, 41 Cal. 532 (holding that if the plaintiff offers proof of improper elements of damage, the defendant should object to the evidence, and if his objection be overruled, have the ruling reviewed on appeal).

16. *Aitken v. Mendenhall*, 25 Cal. 212.

17. *Supreme Lodge etc. v. Los Angeles Lode No. 386*, 177 Cal. 132, 169 Pac. 1040; *Clark v. San Francisco etc. Ry. Co.*, 142 Cal. 614, 76 Pac. 507; *Kerry v. Pacific Marine*

Co., 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89; *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228; *Garlick v. Bower*, 62 Cal. 65; *Reniff v. The Cynthia*, 18 Cal. 669; *Palmer v. Reynolds*, 3 Cal. 396; *Goodman v. Dailey*, 21 Cal. App. 229, 131 Pac. 335; *Miller v. Myers*, 46 Cal. 535. See infra, § 124, as to effect of allegations in limiting amount of recovery.

18. *Goodman v. Dailey*, 21 Cal. App. 229, 131 Pac. 335.

19. *Barnes v. Berendes*, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406. See supra, § 120, as to sufficiency of findings to support judgment.

20. Code Civ. Proc., § 585, subd. 1.

assessed by a jury, or by reference, in the case of a long account.¹ Where the amount of damages alleged in the complaint, though arising upon an unliquidated claim, is not denied by the answer, and no issue is created thereon, it is proper to render judgment by default for the amount so alleged without taking proofs on the subject.²

§ 122. Appeals.—The court in assessing damages on a motion for judgment on the pleadings, exercises the function of a jury, and its judgment is entitled to the same consideration on appeal as if entered on a verdict.³ The appellate court will not undertake to examine the proofs on the issue of the amount of damages, or to declare that there was an insufficiency of evidence to justify the verdict.⁴ Where judgment is given for an amount in excess of the compensation made necessary by the findings, but the court finds that the wrongful act of defendant was done maliciously and for the purpose of harassing and oppressing the plaintiff, it will be presumed on appeal that the excess represents exemplary damages.⁵ But where the court erroneously instructed the jury that the plaintiff was entitled to an award of punitive damages, upon establishing malice in fact, the appellate court cannot disregard the error, if the award of the jury was general, on the theory that the reasonableness of the verdict shows that it was intended merely for compensatory damages.⁶

1. Code Civ. Proc., § 585, subd. 2.

2. *Johnson v. Vance*, 86 Cal. 110, 24 Pac. 862; *Dimick v. Campbell*, 31 Cal. 238; *Hartman v. Williams*, 4 Cal. 254. See *infra*, § 123, as to necessity that, to sustain any judgment, the complaint must state the facts necessary to entitle the plaintiff to recover.

3. *Salo v. Smith*, 25 Cal. App. 295, 143 Pac. 322.

4. *Bartlett v. Hogden*, 3 Cal. 55. See *APPEAL AND ERROR*, vol. 2, p. 916.

5. *Barnes v. Berendes*, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406. See *APPEAL AND ERROR*, vol. 2, p. 883.

6. *Lewis v. Hayes*, 165 Cal. 527, Ann. Cas. 1914D, 148, 132 Pac. 1022. But see *Clark v. Torchiana*, 19 Cal. App. 786, 127 Pac. 831, holding that when the amount awarded is less than the actual damages proved, no question as to punitive damages can arise on the record.

And where the plaintiff pleads two elements of damage, a general verdict returned for him in a single sum cannot be upheld if substantial error was committed with respect to one of such elements, even though the verdict rendered was for the exact amount prayed for in connection with the other.⁷ A judgment for nominal damages, will not be set aside on the ground of uncertainty in the finding, where the error, if any, is too trivial to be harmful.⁸ Exclusion of evidence bearing on the amount of damages, or tending to show special damage, is harmless error where the jury finds that the plaintiff has no case.⁹

Pleading.

§ 123. Complaint—In General.—The Code of Civil Procedure provides that the complaint must contain, among other things:

“A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.”¹⁰

Damages, to be recovered, must be alleged.¹¹ The amount thereof to which the plaintiff is entitled must be

7. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834.

8. *Davidson v. Devine*, 70 Cal. 519, 11 Pac. 64. See *Broads v. Mead*, 159 Cal. 765, Ann. Cas. 1912C, 1125, 116 Pac. 46, holding that a finding of nominal damages does not warrant a judgment for as much as one hundred dollars.

9. *Yaeger v. Southern California Ry. Co.*, 5 Cal. Unrep. 870, 51 Pac. 190. See *APPEAL AND ERROR*, vol. 2, p. 1004 et seq., as to harmless error generally.

10. Code Civ. Proc., § 426.

11. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797; *Philip v.*

Durkee, 108 Cal. 300, 41 Pac. 407; *Waincott v. Occidental etc. Assn.*, 98 Cal. 253, 33 Pac. 88; *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Edwards v. Sonoma Valley Bank*, 59 Cal. 136; *Harron, Rickard & McCone v. Wilson, Lyon & Co.*, 4 Cal. App. 488, 88 Pac. 512 (holding that a claim of damages in a named sum, without any allegation of facts showing substantial damage, renders a pleading subject to special demurrer).

A complaint which shows a right to recover nominal damages is good against a general demurrer. *Harron, Rickard & McCone v. Wilson*.

stated.¹² The rule is sustained in many decisions that a complaint which states the facts showing the plaintiff's damage, in a manner sufficient to sustain a judgment, and concludes with a prayer for damages in a named sum, is sufficient though it fails to contain a formal allegation that plaintiff has been damaged in a stated amount.¹³ A general averment of and prayer for damages in a named sum may be a sufficient averment of damage, at least in the absence of a special demurrer or objection to the evidence of damage.¹⁴ But a mere prayer for judgment in the

Lyon & Co., 4 Cal. App. 488, 88 Pac. 512; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380.

12. *Munson v. Fishburn*, 183 Cal. 206, 190 Pac. 808; *Wainscott v. Occidental etc. Assn.*, 98 Cal. 253, 33 Pac. 88; *Pittsburg C. M. Co. v. Greenwood*, 39 Cal. 71; *Johnson v. Weininger*, 40 Cal. App. 484, 181 Pac. 103.

To sustain a judgment by default for damages, the complaint must state the facts necessary to entitle the plaintiff to recover the sums included in the judgment. *Lynn v. Knob Hill Improvement Co.*, 177 Cal. 56, 169 Pac. 1009.

13. *Tucker v. Cooper*, 172 Cal. 663, 158 Pac. 181 (applying the rule to an action for personal injuries); *Bryant v. Broadwell*, 140 Cal. 490, 74 Pac. 33 (where the amount of damages sufficiently appeared from the allegations and deductions therefrom); *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915; *Bartlett v. Odd Fellows Savings Bank*, 79 Cal. 218, 12 Am. St. Rep. 139; *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Abalas v. Consolidated Const. Co.*, 32 Cal. App. 732, 164 Pac. 19 (applying the rule to an action for personal injuries); *Los Angeles O. G. Assn. v. Pacific S.*

Co., 24 Cal. App. 95, 140 Pac. 295; *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47; *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 112 Pac. 892.

A complaint alleging that defendant wounded and bruised plaintiff and rendered him sick, sore and lame, "to his damage in the sum of five thousand dollars," says, in language technically defined by long use, that by reason of defendant's acts plaintiff suffered damage in, or sustained damage to, the amount named, and is a sufficient allegation of the fact of damage. *Pennington v. Caughey*, 145 Cal. 10, 78 Pac. 227. See *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 742, 90 Pac. 125, holding that if the complaint in respect to an allegation of an element of damage is insufficient in that connection, where it could not have operated as a surprise to the defendant, it was harmless error. And *McVay v. Central California Inv. Co.*, 6 Cal. App. 184, 91 Pac. 745, holding an averment sufficient in an action for the negligent destruction of property.

14. *Martin v. Durand*, 63 Cal. 39; *Moore v. Fredericks*, 24 Cal. App. 536, 141 Pac. 1049.

gross sum cannot be treated as an allegation of damages.¹⁵ An express allegation of the nonpayment of damages need not be made.¹⁶

§ 124. Allegations as Limiting Amount of Recovery.—

The general rule is that damages cannot be recovered in a sum greater than that claimed by plaintiff in his complaint.¹⁷ Where the allegations of fact in the complaint disclose the precise amount of damages sustained, the fact that the *ad damnum* clause specifies a larger amount, will not justify a recovery of any greater sum than that shown by the allegations to be due.¹⁸ But a plaintiff is not restricted in his recovery to the amount of damages alleged, where he prays judgment in a large sum, and it appears that the amount alleged does not cover further detriment accruing subsequently to the filing of the complaint.¹⁹ Thus a plaintiff in a personal injury case may recover for impairment of future earning power under his general allegation of damages, even though he has claimed in his complaint, specific sums for total loss of earning power up to the filing of the complaint and for a term thereafter, as he is not concluded by these allegations.²⁰ But where the plaintiff has specially alleged a particular damage, and the amount, he is concluded by his allegation, and cannot give in evidence proof of additional loss on that account.¹ Where a verdict is returned for damages in ex-

15. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797.

A prayer for damages is not a part of the complaint, and the fact that the plaintiff prays for exemplary damages or any other relief to which he may not be entitled is not a ground for demurrer: *Moropoulos v. C. H. & O. B. Fuller Co.*, 186 Cal. 679, 200 Pac. 601.

16. *Los Angeles Furniture Co. v. Hansen*, 31 Cal. App. Dec. 391, 188 Pac. 292.

17. See *supra*, § 121.

18. *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89.

19. *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1925; *Arkley v. Union Sugar Co.*, 147 Cal. 195, 81 Pac. 509 (where the complaint was held not to confine plaintiff to proof of only nominal damages).

20. *Campbell v. Bradbury*, 179 Cal. 364, 176 Pac. 685; *Tucker v. Cooper*, 172 Cal. 663, 158 Pac. 181.

1. *Lombardi v. California St. Ry. Co.*, 124 Cal. 311, 57 Pac. 66 (hold-

cess of those claimed in the complaint, it is as a general rule improper to allow an amendment to the complaint to cover the larger amount.²

§ 125. Averments of Items of Damages.—In ordinary actions of tort it is unnecessary to state specifically and in amounts the different items which go to make up the sum total of damages. It is enough to state the facts constituting the cause of action, and claim so much in gross as damages for the wrong done.³ Thus the loss occasioned by physical or mental suffering need not be separately stated;⁴ nor that arising from inability to attend to business;⁵ nor the amount of damage arising from indignity and humiliation, as distinct from the amount due to injury to health which the indignity occasioned. These items of injury must be pointed out, but they are not capable of computation, and no specific amount of damages should be assigned to them.⁶ Where the alleged wrong is a continuing one, and in law is indivisible, a single statement of the entire damage sustained, in one sum, is proper.⁷

But where there are different elements of damage flowing from the wrong, and the amount of damages from each element is capable of exact statement, the defendant has

ing that an allegation that personal injuries had prevented plaintiff from attending to his business and compelled him to hire help to his damage in a named sum, precluded evidence of additional damage in the way of lost profits).

2. *Clarke v. San Francisco etc. Ry. Co.*, 142 Cal. 614, 76 Pac. 507.

3. *Kuhns v. Marshall*, 44 Cal. App. 588, 186 Pac. 632; *Castino v. Ritzman*, 156 Cal. 587, 105 Pac. 739; *Samuels v. California St. etc. Ry. Co.*, 124 Cal. 294, 56 Pac. 1115; *Abalas v. Consolidated Const. Co.*, 82 Cal. App. 732, 164 Pac. 19;

Seragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706; *Lauder v. Currier*, 3 Cal. App. 28, 84 Pac. 217; *Montgomery v. Locke*, 2 Cal. Unrep. 693, 11 Pac. 874.

4. *Seragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706.

5. *Castino v. Ritzman*, 156 Cal. 587, 105 Pac. 739.

6. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

7. *Trabing v. California Navigation etc. Co.*, 121 Cal. 137, 53 Pac. 644.

the right to be informed of the amount claimed for each, so that he may be prepared with evidence at the trial to meet the several claims.⁸ This rule has been applied to claims for injuries to person, reputation and property arising from a number of different tortious acts;⁹ to injuries to real and also to personal property arising, in conjunction with injuries to health, from defendant's wrong, the former being capable of exact ascertainment;¹⁰ to a complaint charging a trespass resulting in tearing down portions of a building, damaging goods, and breaking up plaintiff's business, as well as causing him great mental and physical distress, the amounts of property damage not being separately specified;¹¹ to a trespass in driving off livestock, causing the death of some, taking possession of a building, breaking up plaintiff's business, and necessitating various items of expense, as well as loss of profits;¹² and to a complaint alleging that a nuisance has occasioned several distinct injuries to the plaintiff.¹³

Since in an action for damages the plaintiff may recover an amount "which will compensate for all the detriment proximately caused" by the act complained of,¹⁴ where the injuries complained of are all damages to property and arise out of one primary wrong, and are set out as sepa-

8. *Gomez v. Reed*, 178 Cal. 759, 174 Pac. 658; *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523; *Foerst v. Kelso*, 131 Cal. 376, 63 Pac. 681; *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623.

Overruling a demurrer for uncertainty, properly taken for violation of the rule here considered, is prejudicial error. *Foerst v. Kelso*, 131 Cal. 376, 63 Pac. 681. But as the rule is intended merely to allow the defendant to select his points of defense, it has been held that when he files an answer denying all alleged wrongful acts and all lia-

bility whatsoever, the error in overruling such a demurrer becomes harmless; *Rooney v. Gray*, 145 Cal. 753, 79 Pac. 523.

9. *Bowman v. Wohlke*, 166 Cal. 121, Ann. Cas. 1915B, 1011, 135 Pac. 37.

10. *Foerst v. Kelso*, 131 Cal. 376, 63 Pac. 681.

11. *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757.

12. *Gomez v. Reed*, 178 Cal. 759, 174 Pac. 658.

13. *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623.

14. Civ. Code, § 3333.

rate items of damage arising from a single tort, there is but one cause of action alleged.¹⁵

§ 126. General Damages.—Under the *ad damnum* clause, or general allegation of damages, a plaintiff may prove and recover those damages which naturally and necessarily result, from the act complained of.¹⁶ Such damages need not be specially pleaded.¹⁷ But only such damages as are the natural consequences of the act which constitutes the right of recovery can be recovered without special averment.¹⁸ Under the rule above stated, evidence of general damages, such as physical inconvenience and mental suffering and humiliation, is admissible under the general statement of damages for tort or trespass.¹⁹ So too re-

15. *Moropoulos v. C. H. & O. B. Fuller Co.*, 186 Cal. 679, 200 Pac. 601 (holding this to be the rule where, besides the various items for actual damages, the complaint contained a prayer for exemplary damages). And see *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114, where the supreme court sustained damages on the single cause of action, for loss of profits and established trade, loss of lease, loss of improvements on the leased premises, loss of a privilege from adjacent premises, and expenses incident to removal to other quarters.

16. *Gomez v. Reed*, 178 Cal. 759, 174 Pac. 658; *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706; *McLaughlin v. McLaughlin*, 17 Cal. App. 699, 121 Pac. 704; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690. And see cases cited *infra*, this section. See

supra, §§ 19-21, as to distinction between general and special damages.

17. *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 Pac. 839; *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266.

18. *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Dabovich & Co. v. Emeric*, 12 Cal. 171. See *infra*, § 127, as to special damages.

19. *Solo v. Smith*, 25 Cal. App. 295, 143 Pac. 322. See the following cases in which the averments as to damages were held sufficient: *Waite v. San Fernando Pub. Co.*, 178 Cal. 303, 173 Pac. 591; *Oberkotter v. Woolman*, 62 Cal. Dec. 623, 202 Pac. 669 (allegation of general and special damages held sufficient); *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 Pac. 839 (averments held sufficient as to loss of earning power); *Abalas v. Consolidated Const. Co.*, 32 Cal. App. 732, 164 Pac. 19 (where under an averment that plaintiff "expended much for medicines and treatment and

covery may be had under the general *ad damnum* clause of a complaint not only for the physical and mental suffering which the injured party has endured but which he must continue to endure, and which necessarily results from the infliction of bodily injuries.²⁰ Even though it be necessary to allege mental suffering to recover therefor, the complaint need not directly mention such suffering. It is sufficient as to such damages if it appears from the complaint that the plaintiff's nervous system was shattered and unstrung, and that he suffered, and would continue to suffer, pain and anguish.¹

In actions for damages for breach of contract the same general rule prevails. In such actions an allegation of the contract and its breach, and that by reason of the breach plaintiff has been damaged in a named sum, is good as an allegation of general damages.² For the breach of a contract to pay a stipulated sum of money, the pleader properly claims damages, which consist in the sum unpaid, with interest.³ But where a complaint alleges a promise to pay a certain sum, for which judgment is prayed, it is unnecessary to allege that plaintiff has been damaged in such sum.⁴ And where suit is brought for installments of money due at particular dates, the fact that interest is not specially asked for in the complaint

employment of physicians," evidence was admitted as to the items and their amounts); *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693 (case tried on the theory that mental suffering was in issue).

20. *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706.

1. *Boa v. San Francisco etc. Rys.*, 182 Cal. 93, 187 Pac. 2; *Jones v. Key*, 36 Cal. App. Dec. 505, 202 Pac. 478.

2. *Moore v. Fredericks*, 24 Cal. App. 536, 141 Pac. 1049.

The question as to how general damages from breach of contract have arisen, otherwise than as disclosed by the general allegation of damage, is the subject of evidence rather than pleading. *Lillie v. Weyl, Zuckerman & Co.*, 45 Cal. App. 607, 188 Pac. 619.

3. *Compressed Air Co. v. West San Pablo Co.*, 9 Cal. App. 361, 99 Pac. 531.

4. *Dickinson v. Zubiati Mining Co.*, 11 Cal. App. 656, 106 Pac. 123.

does not preclude its allowance under section 3287 of the Civil Code.⁵

Supplemental pleading.—Under section 3283 of the Civil Code, providing that damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, no supplemental pleading is necessary to support such a recovery.⁶

§ 127. Special Damages.—The defendant cannot be presumed to be aware of the damage naturally, though not necessarily, resulting from his act, and therefore, in order to prevent a surprise on him, this sort of damage must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it.⁷ Notwithstanding

5. *Chambers v. Security etc. Sav. Bank*, 31 Cal. App. Dec. 399, 188 Pac. 818.

6. *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415; *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687.

7. *Mills v. San Diego Conservatory of Music*, 32 Cal. App. Dec. 93, 60 Cal. Dec. 34, 191 Pac. 546; *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200; *Gomez v. Reed*, 178 Cal. 759, 174 Pac. 658; *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415; *Judson Mfg. Co. v. Lutge*, 174 Cal. 566, 163 Pac. 1017; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108; *Childers v. San Jose Mercury P. & P. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119; *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755; *Treadwell v. Whittier*, 80

Cal. 574, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882; *Potter v. Froment*, 47 Cal. 165; *Lewiston Turnpike Co. v. Shasta & W. W. R. Co.*, 41 Cal. 562; *Nunan v. City and County of San Francisco*, 38 Cal. 689; *Macdougall v. Maguire*, 85 Cal. 274, 95 Am. Dec. 98; *Gay v. Winter*, 34 Cal. 153; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Dabovich v. Emeric*, 12 Cal. 171; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Cohn v. Bessemer G. E. Co.*, 44 Cal. App. 85, 186 Pac. 200; *Robinson v. Rispin*, 33 Cal. App. 536, 165 Pac. 979; *Moore v. Fredericke*, 24 Cal. App. 536, 141 Pac. 1049; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690; *Harron-Rickard & McCone v. Wilson-Lyon Co.*, 4 Cal. App. 488, 88 Pac. 512; *McCarthy Co. v. Boothe*, 2 Cal. App. 170, 83 Pac. 175; *Montgomery v. Locke*, 2 Cal. Unrep. 693, 11 Pac.

the fact that the code fixes the limitations of recovery as a measure of general damages common to actions for breaches of certain contracts, it is a well-recognized rule of law that recovery may be had for damages not covered by the general liability for breach of contract, where facts are specifically pleaded showing that the injury was one reasonably within the contemplation of the parties.⁸ The facts as to special damages must be stated with particularity,⁹ the amount of such damages must be given,¹⁰ and the means of occasioning them must be set forth.¹¹ Whenever the special damages do not all flow from the same facts, but depend upon proof of different circumstances, the grounds of each claim should be alleged.¹²

874. See *supra*, § 21, as to special damages.

Expenses incurred in defending an action maliciously prosecuted, may be recovered as damages though not alleged to have been reasonable, that being a matter of proof merely. *Stevens v. Chisholm*, 179 Cal. 557, 178 Pac. 128.

8. *Cohn v. Bessemer G. E. Co.*, 44 Cal. App. 85, 186 Pac. 200.

9. *Gomez v. Reed*, 178 Cal. 759, 174 Pac. 658; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108; *Brooks v. Forington*, 117 Cal. 219, 48 Pac. 1073 (holding that counsel fees expended cannot be allowed unless specially prayed for in the complaint. Neither the prayer for general relief, nor that for costs of suit, is sufficient); *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Acheson v. Western Union Tel. Co.*, 96 Cal. 64, 31 Pac. 583; *Lewiston Turnpike Co. v. Shasta & W. W. R. Co.*, 41 Cal. 562; *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Moore v. Fredericks*, 24 Cal. App. 536, 141

Pac. 1049; *Montgomery v. Locke*, 2 Cal. Unrep. 693, 11 Pac. 874. See *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117, to the effect that in the absence of an agreement counsel fees cannot be allowed as a part of the judgment in foreclosure.

10. *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Moore v. Fredericks*, 24 Cal. 536, 141 Pac. 1049. See *Hill v. Weisler*, 1 Cal. Unrep. 724, limiting the right of recovery to the special damages pleaded.

11. *Lewiston Turnpike Co. v. Shasta & W. W. R. Co.*, 41 Cal. 562.

12. *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757.

Where special damages are claimed for breach of contract, owing to the defeat of some special purpose which the contract was to serve for the injured party, both the facts showing this special purpose and the knowledge of the defaulting party concerning it must be specifically set forth. *Cohn v. Bessemer Gas Engine Co.*, 44 Cal. App. 85, 186 Pac. 200; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882.

An allegation that by reason of the breaches of contract the party has been damaged in a named sum, is not enough.¹³

It is only damages which are not the necessary result of the injuries complained of which must be specially pleaded.¹⁴ Where the gist of the action is special damages, and these are inadequately pleaded, only nominal damages can be had.¹⁵ A complaint is not bad for uncertainty because the special damages claimed do not aggregate the total amount of the prayer, where other allegations show that general damages also were sustained.¹⁶ And a failure to allege special damages does not render a complaint demurrable on the ground of misjoinder of, or failure to separately state, causes of action, though facts are alleged upon which a claim of special damages might be founded.¹⁷

§ 128. Liquidated Damages.—In suing for liquidated damages it is necessary to allege that actual damages are impracticable or extremely difficult to fix, in order to bring the provision for liquidated damages within the validating exception of section 1671 of the Civil Code. In the absence of an objection by special demurrer, an allegation that “at all times, it was, and is impracticable and extremely difficult to fix the amount of damage or loss to plaintiffs or to prove the same,” has been held to be suffi-

13. *Judson Mfg. Co. v. Lutge*, 174 Cal. 566, 163 Pac. 1017.

14. *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706. See *supra*, § 126, as to physical and mental suffering necessarily resulting from injuries and which must continue to be endured by the injured party.

15. *Acheson v. Western Union Tel. Co.*, 96 Cal. 641, 31 Pac. 583.

Where the cause of action itself does not depend upon the existence of special damages, the fact that special damages are not pleaded in

the complaint cannot be reached by demurrer. *McCarty v. Beach*, 10 Cal. 461.

16. *George Cople Co. v. Hindes*, 34 Cal. App. 576, 170 Pac. 155.

17. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119.

A complaint for the value of personal property wrongfully seized, and for indirect damages from the seizure, such as interruption and loss of business, loss of credit, etc., states but one cause of action. *Phelps v. Owens*, 11 Cal. 22.

cient.¹⁸ But, in general, the facts showing the impracticability or difficulty of arriving at the actual damages should be alleged.¹⁹ In a case where a contract was made for repairs to a building and grounds, and contained a stipulation for liquidated damages for each day the building should remain unfinished after a certain date, an allegation that the "work" was not complete until after that date was held insufficient to warrant a recovery of liquidated damages, since, it was said, the uncompleted work may have concerned the grounds only.²⁰ Inasmuch as a stipulation for liquidated damages, though void, does not affect the validity of the rest of the contract, a complaint which sets out the contract and its breach, with a prayer for damages, states a cause of action for actual damages, the allegations respecting liquidated damages in such case being treated as surplusage.¹

§ 129. Exemplary Damages.—Where the complaint charges express malice, or other ground for an award of punitive damages, the fact that such damages are not expressly prayed, does not prevent their allowance, the total amount prayed for being sufficient to cover the allowance of punitive damages made by the jury.² But, on the other hand, a mere prayer for exemplary damages, where no facts are alleged to warrant such a recovery, is insufficient.³ An allegation that defendant "wickedly and mali-

18. *Dyer Bros. etc. v. Central Iron Works*, 182 Cal. 588, 189 Pac. 445.

19. *Stephens v. Daugherty*, 33 Cal. App. 733, 166 Pac. 375; *Rez v. Summers*, 34 Cal. App. 527, 168 Pac. 156. See *Stark v. Shemada*, 63 Cal. Dec. 106, 204 Pac. 214, where it was held that the circumstance that the plaintiff was an auctioneer, and that his purpose, as known to the defendant, was to sell the goods again at public auction, did not add anything to the ordinary measure

of damages for breach of the contract to sell, or bring the stipulated damages within the exception of section 1671 of the Civil Code.

20. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231.

1. *Los Angeles O. G. Assn. v. Pacific S. Co.*, 24 Cal. App. 95, 140 Pac. 295.

2. *Waite v. San Fernando Pub. Co.*, 178 Cal. 303, 173 Pac. 591.

3. *Bailey v. Dale*, 71 Cal. 34, 11 Pac. 804.

ciously," libeled plaintiff, with "intent and design," to injure him charges a malevolent disposition of mind, and is sufficient to sustain an award of exemplary damages.⁴ It was held in an early case that malice, or its absence, might be shown where exemplary damages were allowable, though the matter relied on to demonstrate it had not been pleaded. Thus improper language accompanying an assault might be proved though not pleaded. But if a claim for special damages on this account were made, the rule would be otherwise.⁵ Later, however, it was held, that an allegation that defendant committed a tort "unlawfully, oppressively and with force and arms," was insufficient as a basis for exemplary damages, where the complaint was attacked by special demurrer, since the circumstances showing oppression or malice should be alleged in a more specific manner. But it was also held in this case that, in the absence of such a demurrer, and where the trial was had on the theory that the complaint was sufficient, it was too late to raise the question on appeal.⁶

When treble damages are given by statute, the demand for them must be expressly inserted in the complaint, which must either recite the statute, or conclude to the damage of the plaintiff against the form of the statute.⁷ If the statute gives such damages upon the "willful" doing of an act, the complaint should allege the willfulness of the act.⁸ And the allegation must be proved.⁹ It has been held that where the answer alleges that the act in question was done in good faith, the issue is sufficiently tendered.¹⁰

4. *Tingley v. Times-Mirror*, 151 Cal. 1, 89 Pac. 1097.

5. *Macdougall v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98.

6. *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559. See *infra*, § 130, as to denials in answer. See *APPEAL AND ERROR*, vol. 2, p. 241.

7. *Chipman v. Emeric*, 5 Cal. 239.

8. *Barnes v. Jones*, 51 Cal. 303; *Alden v. Mayfield*, 33 Cal. App. 724, 166 Pac. 382.

9. *Stewart v. Sefton*, 108 Cal. 197, 41 Pac. 293.

10. *Alden v. Mayfield*, 33 Cal. App. 724, 166 Pac. 382.

Where both actual and exemplary damages are sought, the amount of actual damage should be pleaded, since the defendants might be willing to concede the amount of that item and contest the exemplary damages alone. Hence an allegation as to both kinds of damages in a gross sum, is bad for uncertainty.¹¹ But where the complaint distinctly sets forth the several amounts claimed for actual and for exemplary damages, a demurrer is properly overruled.¹² Allegations of matters of aggravation, designed to lay a basis for exemplary damages, and a claim for damages on that account, do not constitute a separate cause of action.¹³ But the plaintiff must be careful so to plead these circumstances that there may be no ambiguity or uncertainty in determining that they are set forth solely for the purpose of establishing such a claim. If they are pleaded in such a manner as would be proper for the recovery of damages other than for the wrong which is the gist of the action, the complaint will be bad for misjoinder of causes of action.¹⁴

§ 130. Answer.—A denial that the plaintiff has suffered damage in the exact sum claimed by him is insufficient to create an issue, and on such a state of the pleadings no proof of damages is required.¹⁵ So a denial that the plaintiff has been damaged by the withholding of real property, when the answer tacitly admits the allegation of the complaint as to the value of the rents and profits, is the denial of a legal conclusion only, and raises no issue.¹⁶ An admission, through failure to specifically deny the allegations of a sworn complaint, that the amount of damages is as stated in the complaint, justifies a verdict for that amount.

11. *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

12. *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842.

13. *Lathrop v. Golden*, 6 Cal. Unrep. 284, 57 Pac. 394.

14. *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

15. *Huston v. Twin & City C. Turnpike R. Co.*, 45 Cal. 550; *Higgins v. Wortel*, 18 Cal. 330.

16. *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214.

The finding of the jury upon the admission of the parties, made in the pleadings or otherwise, is not less an assessment of damages than if the finding had been made on conflicting evidence.¹⁷ It has been held that incidental benefit to the plaintiff resulting from the tort of defendant whereby plaintiff was damaged may be deducted from the amount of his damages without having been specially pleaded by the defendant.¹⁸

Denial of liability for exemplary damages.—A defendant is not prevented from showing that he acted in good faith, without malice, and in the belief of his right, by the fact that he has denied doing the acts complained of, he also having denied doing them maliciously or with intent to injure, oppress, or defraud, and having traversed the amount of damages claimed.¹⁹

Burden of Proof.

§ 131. **General Rule—Modifications of Rule.**—The burden of proving the extent of his damage is on the plaintiff.²⁰ This is the general rule in cases of tort,¹ and for breach of contract.² But there is a class of cases of damages for breach of contract in which, if the obligor to the contract repudiates it before the obligee has had an opportunity to perform, matters of mitigation and reduction must be shown by the obligor.³ The distinction seems to

17. *Patterson v. Ely*, 19 Cal. 28.

18. *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189.

19. *Pacific etc. Co. v. Alaska Packers' Assn.*, 138 Cal. 632, 72 Pac. 161.

See supra, § 129, as to raising issue of willfulness in doing act visited by statute with treble damages by allegation in answer that it was done in good faith.

20. *Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834; *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427; *Weichers*

v. Dehail, 41 Cal. App. 547, 183 Pac. 187.

1. See infra, § 132.

2. *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427; *Weichers v. Dehail*, 41 Cal. App. 547, 183 Pac. 187; *Marconi W. T. Co. v. North P. S. Co.*, 36 Cal. App. 653, 173 Pac. 103.

3. *Marconi W. T. Co. v. North P. S. Co.*, 36 Cal. App. 653, 173 Pac. 103 (citing authorities from many jurisdictions illustrating this rule, including *Alderson v. Houston*, 154

lie in whether the contract itself places a burden of substantial expense upon the plaintiff in its performance. If it does, he must show, in order to make out a complete case for damages, what the amount of that expense would be, so that it may be deducted from the contract price.⁴

Contracts of employment.—While it is the duty of an employee who has been wrongfully discharged to seek other employment, and thus diminish the damages sustained by him, he is not required, as a condition of recovery, to show that he has made such endeavor and failed. The burden is on the defendant to show that he could by diligence have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise the damages will be measured by the salary or wages agreed to be paid.⁵ Thus it is incumbent upon the principal, sued by a commission agent for breach of contract, to prove, in mitigation of damages the fact that the plaintiff sold other similar goods during the period of the contract, and the facts from which the gains from that source might be estimated with some degree of certainty.⁶ The burden placed on the employer extends to the matter of prospective damages. Thus where the employee sues before

Cal. 1, 96 Pac. 884, as to the burden of proof in an action for the commissions of a real estate broker, and distinguishing the cases from those in which actual damages only are recoverable).

4. *Marconi W. T. Co. v. North P. S. Co.*, 36 Cal. App. 653, 173 Pac. 103. See *supra*, § 94, as to duty of plaintiff suing on penal obligation to prove actual damages. See *supra*, § 101, as to burden of proving that actual damages are impracticable or extremely difficult to

fix, so as to validate a provision for liquidated damages.

5. *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44; *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 43 Pac. 963; *Ulter v. Chapman*, 43 Cal. 279; *Erskine v. Marchant*, 37 Cal. App. 590, 174 Pac. 74; *Marconi W. T. Co. v. North P. S. Co.*, 36 Cal. App. 653, 173 Pac. 103. See *MASTER AND SERVANT*.

6. *Erskine v. Marchant*, 37 Cal. App. 590, 174 Pac. 74.

the term of service has expired, the employer is required to show that the plaintiff's prospective damages, which are prima facie the whole amount of unearned compensation as fixed by the contract, will probably be lessened by his securing other employment.⁷

§ 132. In Cases of Tort.—Where personal property has been wrongfully taken, the burden is on a plaintiff, seeking to recover for expenses incurred in pursuit thereof, as authorized by section 3336 of the Civil Code, to show that the expenses were properly incurred.⁸ The burden is on a defendant sued for wrongful injury to personal property to offer proof that the cost of repairs, erroneously adopted as the measure of damages, would be greater than the diminution in value caused by the injury.⁹ As against a wrongdoer, there is no presumption that land will be of less value in the future than at the present time.¹⁰

In cases for exemplary damages.—Malice in fact, warranting the recovery of punitive damages, is never presumed, but is always to be proved.¹¹ The only presumption in California concerning malice in fact is that declared by section 1962 of the Code of Civil Procedure which provides that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another. But before this presumption can arise the jury must find as facts, the commission of an unlawful act; that it was deliberate, and that its purpose was to injure another. Hence, in an action for compensatory and punitive damages in an action

7. *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884.

8. *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 32 Fed. 51, 12 Sawy. 519.

9. *Rhodes v. Firestone Tire etc. Co.*, 84 Cal. App. Dec. 635, 197 Pac. 392.

10. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

11. *Lewis v. Hayes*, 165 Cal. 527, Ann. Cas. 1914D, 148, 132 Pac. 1022; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

for libel, it has been held that where the evidence is such as to warrant the inference of malice in fact, as where the defendant has affirmed the truth of the charges by justification in his answer, the burden is cast on him of showing that neither by particular nor general instructions did he authorize their publication, and that neither in fact nor by his conduct was it ratified by him, when he learned of it, if he would escape punitive damages.¹²

Evidence.

§ 133. Admissibility in General.—Following the general principles of evidence, where the allegations of the complaint are insufficient to raise an issue as to damages, evidence of them is properly excluded.¹³ The estimate of a competent witness as to the amount of damages is admissible.¹⁴ But in an action for damages for personal injuries it has been held that the plaintiff may not give opinion evidence, over objection, as to the amount of damages he had suffered by reason of the injury to his person. The rule is that, to recover damages, the witness must state the facts showing the extent of the injuries, the measure of which is the ultimate fact to be found by the jury.¹⁵ It is not necessary that a witness, before testifying to the amount of damages, state the reasons, or grounds, or basis of his estimate, for such reasons may be disclosed by cross-examination.¹⁶

§ 134. Financial Condition of the Parties.—Evidence of the financial condition of the plaintiff in a personal injury case is inadmissible.¹⁷ The only effect and inevitable

12. *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530. See **LIBEL AND SLANDER**.

13. *Witmer Brothers Co. v. Weid*, 108 Cal. 569, 41 Pac. 491. See **EVIDENCE**.

14. *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848 (case of trespass).

15. *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044; *Fleming v. Albeck*, 67 Cal. 226, 7 Pac. 659 (applying the rule in libel case).

16. *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848.

17. *Steinberger v. California Electric etc. Co.*, 176 Cal. 386, 168 Pac.

tendency of evidence of the plaintiff's poverty is to excite the sympathies of the jury and improperly influence their finding upon the question of damages. Such evidence is never admissible in personal injury cases, because the extent of the defendant's liability for his negligence is not to be measured by the affluence or poverty of the person injured, for which the defendant is in no way responsible.¹⁸ Nor is such evidence admissible on the theory that the plaintiff's poverty is a circumstance enhancing his mental worry over his injuries. Where the trial is by the court without a jury, and it is manifest that the judge did not regard the evidence as bearing on the amount of damages, error in its admission will be regarded as harmless.¹⁹

Where exemplary damages are not sought in a personal injury case, evidence of the wealth of the defendant is inadmissible.²⁰ But where, on the other hand, exemplary or punitive damages are claimed, evidence of the defendant's wealth is admissible for the purpose of graduating the amount which it is proper to award.¹ And this rule applies to a corporation defendant.²

§ 135. Physical and Mental Suffering.—It is proper to permit the plaintiff in a personal injury case to testify in detail as to his sufferings from the injuries, where there is no evidence that his suffering has been aggravated by

570; *Scott v. McPherson*, 168 Cal. 783, 145 Pac. 529; *Story v. Green*, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Mahoney v. San Francisco etc. Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Shea v. Potrero & B. V. R. Co.*, 44 Cal. 414; *Johnston v. Beadle*, 6 Cal. App. 251, 91 Pac. 1011.

18. *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577.

19. *Scott v. McPherson*, 168 Cal. 783, 145 Pac. 529.

20. *Story v. Green*, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870.

1. *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875; *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097; *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050; *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.

2. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097.

improper treatment;³ and such testimony may be given to show the physical pain and perhaps the mental anguish under a general statement in the complaint of the aggregate damage, measured in money, directly resulting to him from his injuries.⁴ Evidence of his involuntary declarations and exclamations indicative of physical pain and a present physical condition are competent evidence as distinguished from objectionable declarations only amounting to a statement of a past condition.⁵ But testimony that plaintiff was led to suffer apprehension of permanent disability through statements of physicians not regularly employed to treat the injuries is improper.⁶ And it is also improper to admit evidence of the number and ages of plaintiff's children, as increasing his mental suffering.⁷

§ 136. Wages—Loss of Time—Earning Capacity.—Evidence of the rate of wages which plaintiff, suing for personal injuries, was receiving at the time of injury is admissible.⁸ So also to show the value of his lost time, evidence of the amount of commissions earned by him for

3. *Boa v. San Francisco-Oakland T. Rys.*, 182 Cal. 93, 187 Pac. 2 (holding that in such an action the plaintiff has the right to testify as to her belief at the time of the trial that she would be a permanent invalid); *Jones v. Key*, 36 Cal. App. Dec. 505, 202 Pac. 478 (to the same effect as *Boa v. San Francisco etc. Rys.*, 182 Cal. 93, 187 Pac. 2); *Scharpf v. Union Oil Co.*, 19 Cal. App. 100, 124 Pac. 864.

Evidence as to the nature and extent of nervousness resulting from personal injuries is admissible. *Kuhns v. Wenshall*, 44 Cal. App. 588, 186 Pac. 632.

4. *Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706.

5. *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747; *Dow v.*

City of Oroville, 22 Cal. App. 215, 134 Pac. 197.

6. *Boa v. San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2 (holding, however, that when the apprehension is otherwise well-grounded, the error is harmless).

7. *Smith v. Atchison etc. Ry. Co.*, 179 Cal. 611, 178 Pac. 501. See *supra*, § 134, as to admissibility of evidence of poverty to show mental suffering.

8. *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197; *Ebat v. Scheidt*, 17 Cal. App. 430, 120 Pac. 49.

Evidence of what persons in a similar vocation commonly earn is also admissible. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513.

several years prior to his injuries is admissible.⁹ Likewise, evidence of plaintiff's previous income from his own exertions, is admissible to show the impairment of his earning capacity, as contrasted with what he could make afterwards.¹⁰ Evidence of previous injuries affecting plaintiff's earning capacity is admissible, since the jury should know his physical condition in order to estimate the effects of the injuries sued for.¹¹ But the evidence of both previous and subsequent earnings must concern plaintiff's usual and ordinary business, and not exceptional profits from particular transactions.¹²

§ 137. Injuries to Land.—Evidence as to the detriment to land caused by the wrongful act of another, or occasioned by his negligence¹³ is admissible. Where growing trees are destroyed, evidence of their value, while not affording the measure of damage to the freehold, is relevant.¹⁴ It has been held that where fixtures are wrongfully removed and converted, evidence of their value after the removal, and when considered without reference to the uses for which they were intended, is inadmissible on the issue of damages.¹⁵

9. *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106.

10. *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108; *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106.

Evidence that plaintiff once held positions of trust in several financial and other corporations is relevant to show his earning capacity, the fact that he had ceased to hold them when injured affecting merely the weight of the evidence. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72.

11. *Townsend v. Briggs*, 3 Cal. Unrep. 803, 32 Pac. 307.

12. *Shaw v. Southern Pacific R. Co.*, 157 Cal. 240, 107 Pac. 108.

13. *Woodbeck & Matter v. Wilders*, 18 Cal. 131 (testimony as to injuries to land and as to the pasturage for the season); *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 108 Pac. 885 (where land was flooded through the impounding and bursting out of the waters of a creek).

14. *Doak v. Mammoth Copper Mining Co.*, 192 Fed. 748.

15. *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.

Crops.—In ascertaining the value of crops destroyed before maturity, evidence is admissible of their kind, and of their stage of growth,¹⁶ as to what, under ordinary circumstances, the land is capable of growing, both as to quality and quantity¹⁷ and of the condition and appearance of the crops, not as demonstrating their intrinsic value, but as furnishing a basis for estimates of prospective value.¹⁸ So also evidence is admissible of the average yield of adjacent lands similarly cultivated,¹⁹ of the average crop that would probably have been produced on the land affected,²⁰ of the cost of cultivating, harvesting and marketing,¹ and of the market value of matured crops of the same sort at or near the time of the injury.² But proof of market value is merely to aid in determining the value of the growing crop when destroyed.³

Where the land is leased, evidence of the consequent diminution in the value of the leasehold is admissible. And to this end it is proper to prove both the rental value of the land and the cost of restoring it to its original condition.⁴

§ 138. Miscellaneous Damages—*Expenses of medical attendance.*—Evidence that one receiving personal injuries

16. *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 108 Pac. 885; *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. 425.

17. *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 108 Pac. 885.

18. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942. See *CROPS*, ante, p. 719.

19. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. 425.

20. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas.

779, 12 L. R. A. (N. S.) 267, 90 Pac. 942.

1. *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. 425.

2. *Fay v. Cox*, 45 Cal. App. 696, 188 Pac. 623; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942; *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. 425.

3. *Fay v. Cox*, 45 Cal. App. 696, 188 Pac. 623.

4. *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 108 Pac. 885.

used due care in securing medical aid by employing a well known and reputable physician to treat his wounds, is admissible to show that his damages had not been enhanced by his own negligence.⁵ But evidence of the general reputation for skill of the plaintiff's physician is inadmissible on the part of defendant in a personal injury case, in mitigation of damages.⁶ While the correct measure of damages for medical and hospital treatment necessitated by physical injuries is the reasonable value, evidence of what plaintiff actually paid is admissible as some evidence of such value.⁷ But proof of an indebtedness newly incurred, is inadmissible under a complaint which alleges only that plaintiff had been "compelled to pay," etc.⁸

Attorney's fees.—Where it is sought to recover attorney's fees as damages, the papers in the proceeding in which the fees were incurred, are admissible as bearing on the reasonableness of the fee.⁹

Future damages.—Though future detriment, in order to sustain a recovery of damages, must be certain to result, evidence of physicians, testifying as experts in a personal injury case, that future relapse or complications, might be expected, and that they occurred in a majority of cases is admissible as tending to prove the reasonable certainty of future injury, its probative force being for the jury. The rule as to certainty of future detriment does not mean that the testimony of a witness should be excluded unless he is reasonably certain that the indicated results will follow, nor that isolated portions of his testimony should, standing alone, or considered with other evidence, extend to the degree of strength required to establish reasonable

5. *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

6. *Thorne v. California Stage Co.*, 6 Cal. 232.

7. *Townsend v. Keith*, 34 Cal. App. 564, 168 Pac. 402.

8. *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 104 Pac. 312. See *supra*, § 124, as to effect of allegation as limiting evidence admissible.

9. *Stevens v. Chisholm*, 179 Cal. 557, 178 Pac. 123. See *supra*, § 126.

certainty as to future resulting consequences. It is the province of the jury to weigh and determine its value as proof. But the testimony which will establish the reasonable certainty of future detriment must be clearly distinguished from conjecture, or such as merely establishes a possibility of future trouble.¹⁰

Where mortuary tables are introduced to show the expectation of life of a plaintiff suing for personal injuries, evidence of plaintiff's addiction to the use of intoxicants is admissible as bearing on his life expectancy, as affecting the question of damages. Nor need such evidence be confined to the time of injury.¹¹

On counterclaim for damages to crop.—In actions by a canal company to foreclose liens to secure promissory notes given by a rice company in payment for water, wherein the defendant filed counterclaims for damages alleged to have been suffered because of the partial failure of a rice crop alleged to be due to the delay of the plaintiff in furnishing irrigating water, testimony of witnesses as to the effect upon a rice crop of delay in furnishing water has been held to be clearly admissible for the purpose of showing that such delay was the proximate cause of defendant's loss.¹²

§ 139. Breach of Contract in General—Loss of Profits.

Where plaintiff sues for breach of a contract pursuant to which defendant purchased land of which plaintiff was to have the management, care and cultivation and in the profits of which he was to share, it has been held that testimony may be given as to the present value of land similarly situated and planted. Such evidence is not objectionable as being too remote or speculative.¹³ One

10. *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436. *American R. & A. Co.*, 182 Cal. 549, 189 Pac. 277.

11. *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

12. *Sutter, Butte C. Co. v. American R. & A. Co.*, 182 Cal. 549, 189 Pac. 277. On like principle, where one, holding a contract for the sinking of

who contracts to do certain work in improvement of real estate for an interest in it, after the work is finished, may, upon a suit for a breach of the contract, prove the value such an interest would have, such value being the contract price, less the reasonable cost of doing the work.¹⁴ And in an action upon a contract which contemplates a long period of time for performance, if the trial be delayed, the conditions existing at the time of the trial, as affecting the question of prospective profits, may be shown in evidence.¹⁵ Where an element of damages is the value of plaintiff's services, evidence of his average earnings in other similar employment, though not conclusive, is some evidence of the value of the services in question, and is therefore admissible.¹⁶ In actions to recover damages resulting from a breach of a contract of sale, evidence of market value and of the cost of the article is generally involved in the inquiry as to the detriment caused by the breach. This subject is considered in a succeeding section of this article, and generally in other articles touching upon such contracts.¹⁷

Where loss of profits from an injury to an established business is an element of damages, evidence of profits actually made,¹⁸ and also of the volume of business before

artesian wells, sues for loss of profits in not being allowed to carry it out, evidence as to profits made in sinking wells of similar character in the neighborhood is admissible. *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 Pac. 865.

14. *Richmond Wharf & Dock Co. v. Blake*, 39 Cal. App. 1, 177 Pac. 508.

15. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

16. *Gross v. Petersen*, 30 Cal. App. 482, 158 Pac. 511. See *Baker v. Southern Pac. Co.*, 184 Cal. 357, 193 Pac. 765 (holding in an action for

damages for personal injuries sustained by a locomotive fireman while engaged in the performance of his duties, that testimony that he was in line of promotion to the position of locomotive engineer at an increased salary with only one man ahead of him was admissible in reference to his reasonable future expectations).

17. See *infra*, § 140, as to proof of value. And see *SALES; VENDOR AND PURCHASER*.

18. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327.

and after the injury,¹⁹ is admissible. Expert testimony, especially that from which the court or jury must determine what will be the probable profits of the business in the future, is not always or even generally the most satisfactory. But, with all these disadvantages with respect to proof in cases of this character, it is still the law that prospective or future profits may be the basis of a recovery.²⁰

§ 140. Proof of Value.—It has been said that proof of particular sales is not competent to show market value,¹ yet the price at which a thing is sold may be shown as tending to prove its value.² Evidence of the market value of the property in the nearest market is admissible as some evidence tending to show its value.³ But where evidence of market value at the place of performance is clear and explicit, evidence of value in other markets is inadmissible.⁴ And evidence of what the proposed purchaser had contracted to resell them for to third persons is irrelevant to the issue of market value, and is inadmissible.⁵ Proof of market value should be limited by the court, in the exercise of a sound discretion, to a period reasonably proximate to that of the date at which its value is material in the case.⁶

19. *Hawthorn v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114.

20. *Meer v. Cerati*, 35 Cal. App. Dec. 631, 200 Pac. 501. See *supra*, § 36.

1. *Fairchild etc. Co. v. Southern etc. Co.*, 158 Cal. 264, 110 Pac. 951.

2. *Yukon River etc. Co. v. Gratto*, 436 Cal. 538, 69 Pac. 252; *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091; *Meyer v. McAllister*, 24 Cal. App. 16, 140 Pac. 42.

Value of land cannot be proven by showing the value of other property not shown to be similar in

character and situation. *Dean v. Hawes*, 29 Cal. App. 689, 157 Pac. 558.

3. *Quint v. Dimond*, 147 Cal. 707, 82 Pac. 310. See *supra*, § 79, as to what constitutes value and market value.

4. *Pugh v. Porter Brothers Co.*, 118 Cal. 628, 50 Pac. 772.

5. *Ramish v. Kirschbraun & Sons*, 90 Cal. 581, 27 Pac. 433.

6. *Strait v. Wilkins*, 23 Cal. App. 774, 139 Pac. 911.

In an action for delay in the delivery of goods, evidence of what the goods were worth in the market

Original and replacement costs.—It has been held repeatedly that evidence of the cost of property of which one has been wrongfully deprived, is admissible as a circumstance tending to show its value.⁷ While such testimony may have slight probative value only, it may nevertheless be sufficient, in the absence of any counter testimony, to sustain a finding as to value.⁸ And so it has been held that evidence as to the cost of new buildings to replace buildings negligently destroyed is admissible, not as affording a criterion of damages, but as furnishing some data by which the court would be enabled to estimate approximately the value of the old buildings.⁹ However, it does not always follow that evidence as to what one has actually paid out to replace the property is admissible.¹⁰

after delivery had actually been made, is inadmissible. *Ramish v. Kirschbraun & Sons*, 90 Cal. 581, 27 Pac. 438.

7. *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729.

Where one sues for having been deprived of personal property, he may prove what it would cost to purchase and replace it in the open market. *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892. See *TROVER AND CONVERSION*.

8. *Sanders v. Austin*, 180 Cal. 664, 182 Pac. 449; *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 112 Pac. 892.

Evidence of the expense of doing work under a contract in a manner materially different from that specified is irrelevant; being no test of the value of the work called for. *Biggerstaff v. Briggs*, 2 Cal. Unrep. 339, 4 Pac. 371.

9. *Cleland v. Thornton*, 43 Cal. 437.

Evidence of the original cost of a building is not admissible as a criterion of damage, in an action for tortious injury to it, but it may be considered as bearing on the condition of the building when injured, and in determining whether restoration could be made at reasonable expense. *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 103 Pac. 320. See *Gosliner v. Briones*, 62 Cal. Dec. 659, 104 Pac. 19, where, for the purpose of recovering damages for the destruction of a certain dwelling-house and windmill, it was held that the cost of removal should, under the circumstances, have been added to the cost of construction, or its value where located; and citing *Pennybecker v. McDougal*, 48 Cal. 160.

10. *Fairchild etc. Co. v. Southern etc. Co.*, 158 Cal. 264, 110 Pac. 951; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915.

Property without market value.—The owner of property which has no market value may testify as to its peculiar value to himself.¹¹ Where there is no market value for corporate stock, the inquiry into its actual or intrinsic value should not be closely restricted. Thus evidence of the amounts of the commodity which the corporation was formed to deal in, which it could obtain under specific contracts for its purchase, and from other sources, is admissible as bearing on the intrinsic value of its corporate stock.¹²

§ 141. Exemplary Damages.—Malice, as a basis for exemplary damages,¹³ may be proved directly or indirectly, that is to say, by direct evidence of the evil motive and intent, or by legitimate inferences to be drawn from other facts and circumstances in evidence.¹⁴ Where punitive damages are sought, the motives of the defendant become a most material subject of inquiry. No circumstance bearing on the question of malice or tending to rebut it should be excluded from the evidence unless the court is satisfied to a moral certainty that no rational inference can be drawn from it.¹⁵ Thus a party against

11. Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 Pac. 286.

12. Peck v. Steinberg, 163 Cal. 127, 124 Pac. 834.

13. See Civ. Code, § 3294. See supra, § 106.

14. Davis v. Hearst, 160 Cal. 143, 116 Pac. 530. See EVIDENCE.

15. Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606 (holding that defendant's claim of title to premises from which he sought to oust plaintiff as a trespasser, the fact that he acted under advice of counsel and that plaintiff was armed, were admissible to rebut malice); Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56 (holding that arresting

officers, sued for exemplary damages for trespass committed in attempt to arrest plaintiff's son, should be permitted to show their efforts to obtain information concerning the offense and their belief in the son's guilt; also the reasons which induced them to act as they did); Lyon v. Hancock, 35 Cal. 372 (holding that defendant, sued for arresting a wife, should be allowed to show previous threats of her husband against him as his reason for believing that she committed the offense against his property for which he made the arrest); Dorsey v. Manlove, 14 Cal. 553 (holding erroneous the exclusion of a void tax assessment under which the de-

whom exemplary damages are claimed may testify as to the intent with which he did the act complained of.¹⁶ And on the other hand, evidence of similar fraud perpetrated by defendant on parties other than the plaintiff is admissible.¹⁷ Where exemplary damages are sought against a corporation, evidence of the declarations of its officers as to the reason of the acts complained of, made in connection with the acts themselves, are admissible to show corporate motive.¹⁸

§ 142. Weight and Sufficiency of Evidence.—The evidence of the amount of damages sustained by the plaintiff must be reasonably certain.¹⁹ The rule applies to special damages.²⁰ And so, the mere opinion of the plaintiff as to consequential damages, especially where no particulars are disclosed on which the opinion is based, cannot support findings as to the amount of damages.¹ In making an award of damages necessarily resting in judgment and discretion, the jury is not bound by the opinion of experts.²

The principles generally as to weight and sufficiency of proof apply in damage suits, and in respect to issues

defendant, a sheriff, had seized property).

16. *Walker v. Chanslor*, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56.

In an action for damages for fraud, evidence of other persons who had had similar experiences with the defendant had been admissible to show scienter and to lay a foundation for exemplary damages. *Thompson v. Modern School, etc.*, 183 Cal. 112, 190 Pac. 451.

17. *Thompson v. Modern School*, 183 Cal. 112, 190 Pac. 451.

18. *Lowe v. Yolo County etc. Water Co.*, 157 Cal. 503, 108 Pac.

297; *Pacific etc. Co. v. Packers' Assn.*, 138 Cal. 632, 72 Pac. 161.

19. *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427; *Weichters v. Dehoit*, 41 Cal. App. 547, 183 Pac. 187; *Johnson v. Levy*, 3 Cal. App. 591, 86 Pac. 810. See *supra*, § 23, as to recovery of uncertain damages.

20. *Calkins v. Sorosis Fruit Co.*, 150 Cal. 426, 88 Pac. 1094; *Sherman v. Finch*, 71 Cal. 68, 11 Pac. 847.

1. *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 104 Pac. 312; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395; *Scurich v. Ryan*, 14 Cal. App. 750, 113 Pac. 123.

2. *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 103 Pac. 320.

therein as to the amount of damages sustained,³ the pain and suffering caused by the injury,⁴ impairment of the earning capacity of the injured party,⁵ the value of property taken or destroyed,⁶ the amount of lost profits,⁷ counsel fees and expenses of litigation,⁸ other moneys expended,⁹ and as to liquidated¹⁰ and exemplary damages.¹¹

Instructions.

§ 143. In General.—The rule that in personal injury cases the amount of damages is discretionary with the

3. *Campbell v. Bradbury*, 179 Cal. 364, 176 Pac. 685 (as to future damages); *Clare v. Sacramento Elec. etc. Co.*, 122 Cal. 504, 55 Pac. 326; *Trabing v. California Nav. & Imp. Co.*, 6 Cal. Unrep. 696, 65 Pac. 478; *Otten v. Spreckels*, 24 Cal. App. 251, 141 Pac. 224 (evidence as to value of newspaper route in action for damages resulting from breach of contract to sell such route).

It is not necessary that any witness should give an opinion as to the amount of damages from pain and suffering. *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316. See *supra*, § 65, as to damages being within the discretion of the jury. See, generally, TRIAL.

4. "Mental suffering can hardly be said to be susceptible of direct evidence." *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693.

5. *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 Pac. 839; *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522; *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72; *Washington v. Pacific etc. Ry. Co.*, 14 Cal. App. 685, 112 Pac. 904 (as to the amount of earnings of a physician).

6. *Sanders v. Austin*, 180 Cal. 664,

182 Pac. 449; *Humphry v. Farmers' Union & Milling Co.*, 32 Cal. App. Dec. 35, 190 Pac. 489; *Mortimer v. Marden*, 93 Cal. 172, 28 Pac. 814. See *supra*, § 140, as to admissibility of evidence of value.

7. *Western Union Tel. Co. v. Commercial Pac. C. Co.*, 177 Cal. 577, 171 Pac. 317 (as to profits of a business); *Strecker v. Gaul*, 35 Cal. App. 619, 170 Pac. 646 (damages to crops).

The jury may find the expense of irrigating, harvesting and marketing, from any evidence in the case, and are not restricted to that offered by plaintiff. *Ellis v. Tone*, 58 Cal. 289.

8. *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; *Sherman v. Finch*, 71 Cal. 68, 11 Pac. 847; *Fairbanks v. Williams*, 58 Cal. 241.

9. *Kimic v. San Jose-Los Gatos etc. Ry. Co.*, 156 Cal. 273, 104 Pac. 312; *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625.

10. *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388.

11. *Tingley v. Times-Mirror*, 151 Cal. 1, 89 Pac. 1097; *Foley v. Martin*, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842.

jury,¹² does not mean that they may substitute their feelings, sympathies or passion for the evidence, as the basis of award. Instructions which allow this are uniformly condemned.¹³ On the other hand, instructions to award such sum as the jury "believe," under all the circumstances in evidence, plaintiff should have, have generally been upheld,¹⁴ especially where properly supplemented by more specific instructions as to actual compensation.¹⁵ An instruction in an action for damages, that the jury should award such amount as "in your opinion" will compensate plaintiff is erroneous, plaintiff being entitled to recover only for injuries complained of and proved.¹⁶ An error in instructions, in applying to the case the measure of damages appropriate to breach of contract where the action in fact sounds no tort is not one of which the defendant can complain the rule as given being less onerous than the correct rule.¹⁷

§ 144. Future Detriment.—An instruction that the detriment proximately caused by an assault would include physical pain, mental suffering and wounded sensibility or

12. See *supra*, § 65.

13. *Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164; *Litherbury v. Kimmet*, 183 Cal. 24, 195 Pac. 660 (holding the error cured by a further instruction that the measure of recovery is compensation).

14. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513 (holding the word "believe" equivalent to "find"); *Earl v. San Francisco Bridge Co.*, 31 Cal. App. 339, 160 Pac. 570 (saying such an instruction might be misleading standing alone); *Scully v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325.

An instruction to award such sum as in the jury's best judgment "will fairly and fully compensate" does

not allow any play of feeling on the jury's part. *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591.

15. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513; *Earl v. San Francisco Bridge Co.*, 31 Cal. App. 339, 160 Pac. 570.

16. *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 19 Ann. Cas. 1230, 103 Pac. 320 (holding the error harmless in view of repeated statements of the correct rule).

17. *Empire Co. v. Bonanza Co.*, 67 Cal. 406, 7 Pac. 810; *Neff v. Mattern*, 28 Cal. App. 99, 151 Pac. 382. See *APPEAL AND ERROR*, vol. 2, p. 840.

affection, and the sense of wrong and insult, because of the wrongdoer's malice and oppression, states the rule of damages with substantial accuracy under the code.¹⁸ The use of the word "will" as characterizing future detriment, as in the phrase "will be endured" is uniformly approved as excluding speculative or conjectural damage.¹⁹ And this is said to be radically different from instructing the jury to consider pain and suffering which "may" be endured.²⁰ A correct instruction that the jury may award for suffering which they may believe plaintiff "is certain to suffer" is not vitiated by adding that mental worry, etc., which one suffers or "may suffer" is a proper element of damage.¹ The phrase "reasonably certain," as de-

18. *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315 (citing Civ. Code, § 3283, and *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 678, 32 L. R. A. 193, 44 Pac. 320).

Under section 3283 of the Civil Code, providing that damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, an instruction in action for continuously flooding plaintiff's land, that she could recover only such damages as accrued before the commencement of the suit, is error. The fact that evidence of damage subsequent to the suit had been admitted, would not render the instruction harmless. *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189. See *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663, for an instruction as to whether the injury is temporary or permanent, held not objectionable; and *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114, construing the expression "for all loss or harm suffered thereby."

19. *Ryan v. Oakland Gas etc. Co.*, 21 Cal. App. 14, 130 Pac. 693;

Learned v. Peninsula Rapid Transit Co., 33 Cal. App. Dec. 264, 193 Pac. 591; *Freiberg v. Israel*, 45 Cal. App. 138, 187 Pac. 130; *Gumpel v. San Diego Electric Ry. Co.*, 178 Cal. 166, 172 Pac. 605; *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325; *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436.

20. *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522 (holding the error not cured by an additional instruction stating the correct rule, since it could not be known which the jury followed); *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325. See *Kemp v. Van Bezel*, 35 Cal. App. Dec. 492, 199 Pac. 1099, commenting upon and applying the rule as declared in *Melone v. Sierra Railway Co.*, *supra*.

However, the phrase "may certainly suffer" is proper. *Du Val v. Boos Bros. Cafeteria Co.*, 45 Cal. App. 377, 187 Pac. 767.

1. *Steinberger v. California Electric etc. Co.*, 176 Cal. 386, 168 Pac. 570.

scriptive of future damage, is proper and not in conflict with the statute.² But "reasonably probable" is erroneous.³ "Liable to occur" is bad in an instruction,⁴ as is also the use of the phrase "calculated to inflict," in referring to future damages.⁵ But the pecuniary loss "likely to be sustained" by plaintiff "during life" is not too speculative, where other instructions limit the recovery for future pain to such as will be certainly suffered, and for loss of future earning power to compensation only.⁶

§ 145. Exemplary Damages.—An instruction that plaintiff is "entitled" to punitive damages is erroneous, the matter being discretionary with the jury.⁷ Under the rule that the presence of malice in the wrongdoer is essential to the allowance of exemplary damages against him,⁸ it

2. *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Melone v. Sierra R. R. Co.*, 151 Cal. 113, 91 Pac. 522.

An instruction to the jury to consider what "will probably be" plaintiff's loss of earning power, and that evidence of the loss is not necessary but the jury may estimate it, though correct in using the quoted phrase, is erroneous under the statute in stating that evidence is not required. *Rouse v. Pacific Electric Ry. Co.*, 27 Cal. App. 772, 151 Pac. 164.

3. *Richman v. San Francisco N. & C. Ry.*, 180 Cal. 454, 181 Pac. 769; *Richman v. San Francisco etc. Ry.*, 180 Cal. 454, 181 Pac. 769. But see *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591 (where such an instruction was approved without discussion).

It has been held that the use of "reasonably probable" will not be deemed prejudicial in an instruction which otherwise states the true

rule, that is, that plaintiff is entitled to recover for all damages "certain to result" in the future. But the phrase is not well chosen, and should be omitted. *Lonnergan v. Stansbury*, 164 Cal. 488, 129 Pac. 770.

4. *Saylor v. Taylor*, 42 Cal. App. 474, 183 Pac. 843 (holding the error harmless in view of the serious character of the injuries and the smallness of the award).

5. *Pouchan v. Godeau*, 167 Cal. 692, 140 Pac. 952 (holding the error not cured by other instructions against remote, extravagant, or problematic damages, but not specifically directed to future damages).

6. *Walker v. Southern Pacific Co.*, 162 Cal. 121, 121 Pac. 369.

7. *Lewis v. Hares*, 165 Cal. 527, Ann. Cas. 1914D, 148, 132 Pac. 1022; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290.

8. See *supra*, § 107.

has been held that exemplary damages for the unauthorized malice of an employee is sufficiently stated by instructions that a defendant employer cannot be so charged unless he is found to have been actuated by malice in fact.⁹

Where no case is made for the recovery of punitive damages, it is error to refuse a requested instruction to the effect that such damages cannot be given,¹⁰ or one that damages must be limited to compensation only.¹¹ And if the former is asked and refused, the giving of the latter will not cure the error.¹² An instruction that exemplary damages may be awarded for the "unlawful" seizure of property is erroneous, but harmless where the jury finds that the taking was "malicious."¹³ Where a case is made out for exemplary damages for a wanton trespass, an instruction that plaintiff is entitled to recover only for dam-

9. *Graybill v. De Young*, 140 Cal. 323, 73 Pac. 1067. See *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530, for instruction, though correct as to compensatory damages, held misleading when applied to punitive damages. And see *Trabing v. California Nav. etc. Co.*, 121 Cal. 137, 53 Pac. 644. (S. C., 6 Cal. Unrep. 696, 65 Pac. 478), for instruction held too general to serve as an adequate instruction on the subject of exemplary damages.

An instruction that a master cannot be charged with exemplary damages unless he authorized or ratified the acts complained of, though too general for the guidance of the jury, is not erroneous when they are also told that they must not allow exemplary damages unless authorization or ratification is shown by the evidence.

10. *Mabb v. Stewart*, 133 Cal. 556, 65 Pac. 1085.

It is error to instruct the jury that they may award exemplary damages for the wrongful taking of personal property, if the taking was malicious, when there is no evidence that the taking was of that character. *Hirshberg v. Strauss*, 64 Cal. 272, 28 Pac. 235.

An instruction that the liability of a trespasser is not affected by the fact that the trespass was not willful is erroneous as far as the recovery of punitive damages is concerned, if by "willful" is meant malicious or fraudulent; *Lightner Mining Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771.

11. *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 Pac. 851.

12. *Mabb v. Stewart*, 133 Cal. 556, 65 Pac. 1085.

13. *Lathrop v. Golden*, 6 Cal. Unrep. 284, 57 Pac. 394.

ages to the use and occupation of the premises, no special damages being pleaded, is properly refused.¹⁴

It has been held that an instruction in an action for an assault that the jury may give exemplary damages if defendant was guilty of oppression, "fraud," or malice, following the language of section 3294 of the Civil Code, was not prejudicially erroneous, though there was no proof of fraud in the case.¹⁵ But in an action for assault and battery, an instruction that "if defendant wrongfully used force and violence upon the person of plaintiff in a malicious manner, that is, in a manner that showed he intended to vex, injure or annoy him," then the jury might give exemplary damages, was held erroneous, as charging in effect that if a battery was committed at all the jury might award punitive damages, since it would be hard to conceive of a battery voluntarily committed which did not involve an intent to vex, injure, or annoy.¹⁶ An instruction in an action for personal injuries that the jury should assess damages in such sum "as you believe, under all the circumstances of this case in evidence, the plaintiff ought to recover," not exceeding the amount claimed, is not objectionable as allowing an award of exemplary damages, no claim for such damages being made in the case, and no evidence given warranting their imposition.¹⁷

§ 146. Miscellaneous Instructions.—Instructions which have been upheld as sufficient in respect to various matters of damage may be noted as follows: as to impairment of earning capacity;¹⁸ as to pain and suffering;¹⁹ as to dam-

14. *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685.

15. *Hardy v. Schirmer*, 163 Cal. 272, 124 Pac. 993.

16. *Badostain v. Grazide*, 115 Cal. 425, 47 Pac. 118.

17. *Seally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325.

18. *Doolin v. Omnibus Cable Co.*, 140 Cal. 369, 73 Pac. 1060 (held sufficient as to general damages and as not imposing special damages). See *supra*, § 144, for instructions as to future detriment.

19. *Brinck v. Bradbury*, 179 Cal. 376, 176 Pac. 690; *Wiley v. Young*,

ages resulting from an injury which caused a miscarriage;²⁰ as to loss of earnings¹ and impairment of earning capacity;² as to medical expenses;³ as to breach of contract

178 Cal. 681, 174 Pac. 316; *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603 (instruction that "money is an inadequate recompense for pain," held not prejudicially erroneous when taken with other portions of the charge restricting recovery to compensatory damages).

The jury should be told that they might consider the health and physical ability of the plaintiff before and after the injury, his loss of time, how far the injury was permanent, as well as plaintiff's physical and mental suffering, and that they should allow such damages as, in their judgment, would be a just compensation. *Malone v. Hawley*, 46 Cal. 409.

20. *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315.

1. *Duran v. Yellow Aster Min. Co.*, 40 Cal. App. 633, 181 Pac. 395; *Haun v. Tally*, 40 Cal. App. 585, 181 Pac. 81 (instruction that the value of lost time is subject to direct proof and to be determined only on the evidence); *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 741, 90 Pac. 125; *Washington v. Pacific etc. Ry. Co.*, 14 Cal. App. 685, 112 Pac. 904. See *Lombardi v. California St. Ry. Co.*, 124 Cal. 311, 57 Pac. 66, for instruction as to loss of earnings held misleading and erroneous.

2. *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 Pac. 839.

Where evidence of plaintiff's previous and subsequent earnings is received under the allegation of

general damages to show his loss of earning capacity, the court must instruct that no allowance can be made for the specific monetary loss thus shown. An instruction that the jury could consider plaintiff's inability to perform labor, but could not award damages for "loss of his business trade, or calling," has been held proper; *Shaw v. Southern Pacific R. R. Co.*, 157 Cal. 240, 107 Pac. 108; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513 (holding that there is no conflict between an instruction that the jury must not consider the profits of any business in which plaintiff might have been engaged, and a further instruction that they could consider loss of probable earnings, as the first relates to loss of profits, which had not been pleaded, and the second to impairment of earning capacity).

3. *McLone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522 (holding that where the reasonableness of medical expenses incurred in the treatment of physical injuries is not disputed, an instruction allowing the recovery of actual, instead of reasonable, expenses, is harmless); *Duran v. Yellow Aster Min. Co.*, 40 Cal. App. 633, 181 Pac. 395 (instruction held not objectionable as allowing a departure from the evidence in fixing medical expenses, other instructions limiting consideration of this item to its disclosure in the evidence); *Haun v. Tally*, 40 Cal. App. 585, 181 Pac. 81 (instruction that expenses incurred for physician's services were the subject of direct

and delay consequent thereupon in delivering goods;⁴ and as to injury to growing crops.⁵

In a case where the court instructed the jury in the language of section 3281 of the Civil Code it was held that this was not objectionable as calculated to impress the jury with the idea that defendant was a law-breaker, or unduly emphasizing the subject of damages, thereby leading the jury to believe that plaintiff was entitled to recover.⁶

Erroneous instructions.—An instruction that the jury consider the plaintiff's pecuniary condition is erroneous,⁷ as is also an instruction allowing them to consider the pecuniary condition of the defendant, no exemplary damages being sought.⁸ Instructions allowing a double recovery cannot be upheld.⁹ It has been held that an instruction that the jury may allow the "reasonable value" of work and materials is erroneous where the contract merely providing for the expenses incurred in doing certain work.¹⁰ While it is a duty incumbent upon a person suffering injury by the wrong of another to take such reasonable measures as may mitigate or lessen the damages resulting from such act, one is not required to anticipate a breach by another party to the contract or to take meas-

proof, and to be determined only on the evidence, held proper); *Townsend v. Keith*, 34 Cal. App. 564, 168 Pac. 402 (where a failure to instruct that the allowance must be limited to reasonable expenses was held harmless); *Abalas v. Consolidated Const. Co.*, 32 Cal. App. 732, 164 Pac. 19 (where it was held that the fact that the jury considered expenses for nursing and care although the complaint failed to state the amounts expended could not be objected to on appeal).

4. *Ramish v. Kirschbraun*, 107 Cal. 659, 40 Pac. 1045.

5. *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 4 Pac. 381.

6. *Beyen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269.

7. *Malone v. Hawley*, 46 Cal. 409.

8. *Story v. Green*, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870 (holding the instruction not cured by others correctly enumerating the elements of damages). See *supra*, § 145, as to instructions relating to exemplary damages.

9. *Salstrom v. Orleans Bar Gold Min. Co.*, 153 Cal. 551, 96 Pac. 292.

10. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769.

ures necessitating an interference therewith. An instruction to the effect that he should do this has been declared to be erroneous.¹¹ An erroneous instruction to award plaintiff the penal sum fixed in the contract of guaranty sued on, instead of his actual loss, has been held to be without prejudice to the defendant, where the actual loss would amount to a still greater sum.¹²

11. *Ash v. Soo Sing Lung*, 177 Cal. 356, 170 Pac. 843.

12. *Jones v. Post*, 6 Cal. 102.

(C. M.)

DAMS.

See WATERS.

DEAD BODIES.

- I. INTRODUCTORY.**
 - II. BURIAL AND DISPOSITION OF BODY.**
 - III. CRIMINAL OFFENSES.**
-

I. Introductory.

- 1. Scope of Article.
- 2. Jurisdiction of Courts.
- 3. Character of Body as Property—Subject of Commerce.
- 4. Restrictions on Right of Interment.

II. Burial and Disposition of Body.

- 5. Duty of Husband.
- 6. Duty of Next of Kin.
- 7. Duty Where Deceased Person Leaves No Kindred.
- 8. Punishment for Omitting to Bury.
- 9. Custody for Burial.
- 10. Power of Court to Dispose of Body.
- 11. Testamentary Disposition.
- 12. Custody of Executor or Administrator.

III. Criminal Offenses.

- 13. Mutilation and Removal.
- 14. Interring in City Limits.

Cases are cited in this article to and including 187 Cal., 46 Cal. App. and 208 Pac.

I. INTRODUCTORY.

§ 1. **Scope of Article.**—Although the body of a deceased person unquestionably forms no part of the “property” of his estate, using that word in its ordinary sense, and therefore cannot be said to be owned by anyone, yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. Thus it has come to be recognized that certain near relatives, while not in the full proprietary sense “owning” the body of the deceased, have the right to take possession of such body for the purpose of burying it or making such other disposition as custom may prescribe.¹ This right, which the law now recognizes and protects, and the corresponding duties and liabilities, form the subject of this article. In other articles in this work are treated related matters, such as the establishment and regulation of burial places, and individual rights, duties and liabilities in regard thereto;² sanitary regulations relating to the burial, disinterment and transportation of dead bodies;³ the liability of a decedent’s estate for funeral expenses;⁴ and the subject of inquests to ascertain whether death was the result of a criminal act.⁵

§ 2. **Jurisdiction of Courts.**—In very early times in England the civil courts seem to have exercised jurisdiction over burial places as private property. But the right of the next of kin to dispose of the remains of a deceased body, having its origin in sentiment and in a religious belief in some form of future life, at an early date became a subject of cognizance in the ecclesiastical courts.⁶ These courts gradually extended their jurisdiction until

1. O'Donnell v. Slack, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

2. See CEMETERIES, vol. 4, p. 993.

3. See HEALTH.

4. See EXECUTORS AND ADMINISTRATORS.

5. See CORONERS, vol. 6, p. 541.

6. O'Donnell v. Slack, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

finally their authority in all matters relating to the burial of the dead became exclusive. The secular courts, thus stripped of all authority over the dead, were left to confine themselves to the protection of the monument and other external emblems of grief erected by the living. In this country quite generally courts of equity have power to settle controversies as to the burial of the dead, the care of their remains after burial, and the preservation of the place of interment from wanton violation or unnecessary disturbance.⁷ In California, jurisdiction of such matters relating to the subject of dead bodies as were formerly cognizable in equity or probate courts is now vested in the superior court.⁸

§ 3. Character of Body as Property—Subject of Commerce.—Although it has been said that a dead body may be considered as a sort of quasi property, and although undoubtedly there are certain rights respecting it which the courts recognize and protect, yet such body forms no part of the decedent's estate, and is not property in any proper commercial sense.⁹ It is clear that a dead body is not property in the sense that it may be subjected to a lien for the price of goods furnished during life, or for the value of a casket, or for any other purpose.¹⁰ The Penal Code explicitly provides that

“Every person who arrests or attaches any dead body of a human being, upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.”¹¹

Subject of commerce.—The transportation of the remains of a deceased person is not “commerce” within the

7. 8 Ruling Case Law, p. 684.

Slack, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

8. See COURTS.

9. Enos v. Snyder, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170; O'Donnell v.

10. 8 Ruling Case Law, p. 685.

11. Pen. Code, § 295.

meaning of the term as used in the constitution of the United States, wherein it is provided that "congress shall have power to regulate commerce with foreign nations." On the other hand, the matter of burial and exhumation, with a view to sanitary objects, has always been regarded as a proper subject of local regulation. It affects the public health, and its regulation is strictly within the police powers of the state. Accordingly, it has been held that a statute which makes it unlawful to remove the body of a deceased person from the place of burial, without first having obtained a permit for which a fee is charged, is a valid exercise of the police power of the state, and does not violate the constitutional provision, even though the object of disinterment is to send the body out of the country.¹²

§ 4. Restrictions on Right of Interment.—While the burial of dead bodies is subject to regulation in the exercise of the police power of the state,¹³ this power may not be exercised arbitrarily, but is to be reasonably employed for the accomplishment of the appropriate end in view,—the sanitary welfare of the community.¹⁴ The limits of the power of legislative bodies in restricting the right of interment has been defined in a number of well-considered cases, which are fully considered in another article.¹⁵

12. *In re Wong Yung Quy*, 2 Fed. 624, 6 Sawy. 442.

13. *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 14 Ann. Cas. 1080, 27 L. B. A. (N. S.) 260, 93 Pac. 70; *Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 226, 73 Pac. 987.

14. *Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 226, 73 Pac.

987, per Henshaw, J., concurring; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. Ed. 515, 30 Sup. Ct. Rep. 301, see, also, *Rose's U. S. Notes*.

15. See *CEMETERIES*, vol. 4, p. 1007 et seq.

As to interring in city limits except in a cemetery, see *infra*, § 14.

II. BURIAL AND DISPOSITION OF BODY.

§ 5. **Duty of Husband.**—At common law the husband was bound to bury his deceased wife in a suitable manner, and to defray the necessary funeral expenses, this duty being one involved in his obligation to maintain his wife while living.¹⁶ The Penal Code of California explicitly provides that "If the deceased was a married woman, the duty of burial devolves upon her husband."¹⁷ Included in the obligation to give his deceased wife decent burial is the duty of placing some mark of identification over her last resting place. But if the husband be poor, and the deceased leave a considerable estate, the former ought not to be expected to contribute much to a monument, and it is said to be proper in such a case for the court to fix a reasonable amount to be allowed for that purpose out of the estate of the deceased wife. The amount to be allowed therefor is governed by the custom of people of like rank and condition in society; a distinction being made in this respect, however, between solvent and insolvent estates.¹⁸

§ 6. **Duty of Next of Kin.**

"If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age, and within this state, and possessed of sufficient means to defray the necessary expenses."¹⁹

The duty of burying a deceased person is thus made by statute an express legal obligation on the nearest of kin, within which phrase, as here employed, is included the surviving wife of a deceased husband. But aside from this legal obligation it is settled that the wife has the right

16. In re Weringer's Estate, 100 Cal. 345, 34 Pac. 825.

17. Pen. Code, § 292, subd. 1.

18. In re Weringer's Estate, 100 Cal. 345, 34 Pac. 825. See EXECUTORS AND ADMINISTRATORS.

19. Pen. Code, § 292, subd. 2.

to bury her deceased husband, and the courts do not permit an interference with such right.²⁰ The brothers and sisters of the wife of a deceased husband are in no degree or sense next of kin to such deceased husband, and have no duty or rights with respect to his burial.¹ By the quoted provision of the Penal Code it is made the duty of a brother, who is the nearest of kin of a deceased unmarried sister who has no means of her own, to bury her body; and a trustee who pays for such burial out of the means of the brother in his hands, is entitled to be credited therefor, in an action by the executor of the brother to recover the trust fund.² An action against married women upon a contract for services rendered by undertakers in the burial of their father at their instance and request, is an action of assumpsit to enforce a voluntary agreement, and not to enforce a statutory obligation against the wives under the above provision of the Penal Code, if no facts are stated in the complaint respecting such statutory obligation; and the judgment in such action can bind only the wives and their separate property.³

§ 7. Duty Where Deceased Person Leaves No Kindred. The Penal Code⁴ casts the duty of burying the body of a deceased person, in certain cases, "upon the persons charged with the support of the poor in the locality in which the death occurs." This provision, as applied to municipal corporations, has been said to be only a declaration of a duty already existing, and which belongs to every municipality, for it is the duty of municipal governments to see that the bodies of deceased persons are properly disposed of—just as it is their duty to do many other things

20. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170; *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

1. *In re Seymour's Estate*, 15 Cal. App. 287, 114 Pac. 1023.

2. *Tench v. McMeekan*, 17 Cal. App. 22, 118 Pac. 479.

3. *Terry v. Superior Court*, 110 Cal. 85, 42 Pac. 464.

4. Pen. Code, § 292, subd. 3.

necessary to public health, decency, comfort and convenience. The manner in which dead bodies shall be disposed of, the person or persons by whom they shall be buried, the amount which shall be paid for the work, etc., are all left to the discretion of the municipal authorities.⁵

§ 8. Punishment for Omitting to Bury.—Section 293 of the Penal Code provides as follows:

“Every person upon whom the duty of making burial of the remains of a deceased person is imposed by law, who omits to perform that duty within a reasonable time, is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead treble the expenses incurred by the latter in making the burial, to be recovered in a civil action.”⁶

The provision fixing the liability in a “civil action” is not inoperative because found in the Penal Code.⁷

§ 9. Custody for Burial.

“The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the case in which an inquest is required by law to be held upon a dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed.”⁸

5. *Pacific Undertakers v. Widber*, 113 Cal. 201, 45 Pac. 273, holding that like all other expenditures necessary for the general welfare and not fixed by statute, claims against a municipality arising under a contract for the burial of indigent dead made by the board of supervisors constitute a liability incurred by the municipality, and are, therefore, within the provision of the state constitution forbidding the incurring of any indebtedness or liability for any purpose exceeding

in any one year the revenue provided for it for such year without the assent of the electors expressed at an election.

6. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170; *Pacific Undertakers v. Widber*, 113 Cal. 201, 45 Pac. 273; *Tench v. McMeekan*, 17 Cal. App. 22, 118 Pac. 479.

7. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170.

8. Pen. Code, § 294.

This code provision is clear, and expressly establishes the legal right of the person charged by law with the duty of burying the body of a deceased person to its custody for that purpose.⁹ But aside from the statutory privilege, there is a right, well defined and universally recognized, that in disposing of the body of a deceased person the last offices belong to the next of kin, within which phrase, as here employed, is included the surviving husband or wife. While this right had its origin in affection and religious sentiment, it soon came to be recognized as a strictly legal right, and the next of kin, while not in the full proprietary sense "owning" the body of the deceased, have, it has been said, property rights which will be protected, and for a violation of which they are entitled to indemnification. Thus, if the right is interfered with, damages will be awarded.¹⁰ The husband is charged with the duty of burying his deceased wife, and, consequently, has the control of her body, and may select a proper place for the interment, regardless of the wishes of her parents or other relatives.¹¹ Also, it has been ruled, the wife has the right to the custody of the body of her deceased husband, and this right may not be abrogated by a provision in the husband's will inconsistent therewith,¹² or interfered with by court order.¹³ The provisions of the quoted section of the Penal Code, in so far as defining the persons entitled to the custody of a dead body, are regulative of rights which may be considered and protected in a civil action. The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives.¹⁴

9. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170; *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

10. *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906. As to the liability of a crematory

to relatives or friends of the deceased, see note, 10 A. L. R. 446.

11. *In re Weringer's Estate*, 100 Cal. 345, 34 Pac. 825.

12. *Infra*, § 11.

13. *Infra*, § 10.

14. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 30, 53 L. R. A. 221, 63 Pac. 170.

§ 10. Power of Court to Dispose of Body.—A court of probate has no power to dispose of the body of a deceased person in contravention of the rights of those entitled by law to its custody. Accordingly, where a court in probate had, against opposition interposed by the widow as the next of kin to the deceased, made an order directing the delivery of the remains of her husband to a stranger to his blood, to be removed by such stranger for burial, it was held by the supreme court that this was in excess of jurisdiction. And it was said that in such case neither the court in probate nor the personal representative has any right to the body of the deceased, nor any right to control the manner of disposing of it, nor to dictate the place of interment.¹⁵ But where there is no next of kin, there can be no question of the power of the court to make provision for the repose of the remains in accordance with whatever showing the executors of his estate may make. In fact, it is said to be the duty of the court, upon a proper showing, to make an order authorizing the executors to perform that duty. Whether the course pursued by the executors and the court is in harmony with the expressed wish of the deceased and his widow, deceased before the order was made, cannot affect the court's power to make the order. And where a court of probate has made an order directing the manner of disposing of a body, or the particular place in which it shall be interred, there is no authority for an appeal from such order. Nor is there any warrant for an appeal from an order refusing to vacate and set aside an order providing for the repose of the body and setting apart out of the estate of the deceased a sum of money to be expended for that purpose. The fact that the court exceeded its

15. *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906, the estate, but the court cannot for that reason interfere with the holding, further, that the proper duty and right of burial by the expenses of such disposition may next of kin. well be allowed by the court against

jurisdiction in making the original order does not have the effect of making such order appealable.¹⁶

§ 11. Testamentary Disposition.—The interesting question as to whether the next of kin have the right to the possession of the body of the deceased as against persons claiming under a will has given rise to some conflict in American decisions. It is quite well established, however, that, in the absence of statutory provisions, there is no property in a dead body, that it is not a part of the estate of the deceased, and that one cannot by will dispose of that which after his death will be his corpse. The current of American authorities is to this effect.¹⁷ The question is definitely settled in California by the provision of the Penal Code which declares that "the person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it."¹⁸ This provision is clear and explicit and nullifies any testamentary disposition of the body to others than those entitled by law to receive it. Thus where a man died leaving a will which con-

16. In *re Seymour's Estate*, 15 Cal. App. 287, 114 Pac. 1023, per Hart, J., wherein it was said that if the court was without jurisdiction to make the order, the remedy of the parties dissatisfied with such order would lie in a direct attack upon the court's action in thus usurping jurisdiction or exercising unauthorized power. See *APPEAL AND ERROR*, vol. 2, pp. 188, 192.

17. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170, wherein it is said that in the few cases where there has been any question on the subject, equity has been invoked, and it has been generally declared that the right of burial belongs to the

surviving spouse, or, in other cases, to the next of kin.

There are, as has been observed by the California court, some expressions in the authorities to the effect that the right of burial is in the next of kin, "in the absence of testamentary disposition"; but they are not in cases in which the right of testamentary disposition was involved. *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906. But see *Enos v. Snyder*, *supra*, where it is said that the point was not involved in *O'Donnell v. Slack*, *supra*.

18. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170. See *supra*, § 9.

tained a direction that the manner, time and place of his burial should be according to the wishes and directions of a woman, who was not his wife, it was held, in an action by the wife to obtain the possession of the body, that she was entitled to it.¹⁹

§ 12. Custody of Executor or Administrator.—The question has also been raised as to whether an executor or administrator has, by virtue of his office, the right of burial and the right to the possession of the body for that purpose. Some expressions may be found in the books upholding such a right, but the current of American authorities is the other way. Of course, it is generally provided by statute—as in California by section 1643 of the Code of Civil Procedure—that executors and administrators must pay “funeral expenses”; but it has been customary for the next of kin, and not the executor or the administrator, to have the custody of the dead body before the funeral, and to bury it. Indeed, as has been judicially observed, it cannot be determined who the executor or the administrator is until after the appropriate time for the funeral has elapsed, and burial of the dead is not to be found among the statutory enumeration of the rights and duties of executors and administrators.²⁰ But here again it would seem that the controversy is set at rest by a provision of the Penal Code, which declares that the person charged by law with the duty of burial is entitled to the custody of the body.¹ Hence, the conclusion is that custody and the right of burial do not belong to the executor or administrator, but to the next of kin, and that the courts have the power to protect the next of kin in the exercise of their rights.² But where

19. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170.

20. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170.

1. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170. See *supra*, § 9.

2. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170.

there is, in fact, no next of kin, then it is said to be the duty of the executor or administrator to provide for the disposition of the remains. In such case it is not necessary that the course pursued by the executor or administrator should be in accord with the expressed wishes of the deceased.³

III. CRIMINAL OFFENSES.

§ 13. Mutilation and Removal.—At common law it was an offense to treat a dead human body indecently, and it was indictable to disturb wantonly or illegally such body after burial, to expose it, to sell it for purposes of private gain for dissection, or to disinter it, unless so directed by the deceased in his lifetime or by his relatives after his death, with consent of the public authorities and owners of the ground where this is requisite.⁴ Most of the states now have statutes reaching the various offenses known at common law.⁵ According to the Penal Code,

“Every person who mutilates, disinters, or removes from the place of sepulture the body of a human being without authority of law, is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment.”⁶

This statute is aimed at the crime commonly called “body-snatching”; it has in contemplation the removal of a body from its place of interment whether in the earth or in a vault. The motive is not material, but the offense is not complete unless the body is removed from its resting place. To force a vault open and to remove from the body jewelry, money, or vestments, without removing the body is not disinterment. And to lay bare a coffin resting

3. In re Seymour's Estate, 15 Cal. App. 287, 114 Pac. 1023, per Hart, J.

4. People v. Baumgartner, 135 Cal. 72, 66 Pac. 974 (citing 2 Wharton's Criminal Law, § 1432a).

5. See supra, § 3, as to arresting or attaching dead bodies.

6. Pen. Code, § 290; People v. Baumgartner, 135 Cal. 72, 66 Pac. 974; People v. Dalton, 58 Cal. 226.

at the bottom of a grave, to appropriate money or jewelry therefrom, would not be to "disinter," as that term is used in the statute.⁷

The offense denounced by section 290 of the Penal Code is not the same as that defined by the act of April 1, 1878.⁸ That act makes it a misdemeanor to disinter unless a permit shall first be obtained from the designated authority. It applies as well to relatives and friends of the deceased as to other persons. The act, however, does not repeal section 290 of the Penal Code, but the act and this section are to be read together. And so read, it is said to be clear that it was not the purpose of the act to authorize, contrary to the code section, any person to disinter or remove a dead body, provided he should obtain a permit so to do. It follows, therefore, that an indictment under the act must negative the fact that a permit may have been obtained, but this is not essential in an indictment under the Code.⁹

Unlawfully removing a dead body for purposes of sale or dissection or from wantonness or malice is a felony.¹⁰ The crime of defacing tombs and monuments is treated elsewhere.¹¹

7. *People v. Baumgartner*, 135 Cal. 72, 66 Pac. 974; *People v. Rhew*, 135 Cal. 75, 66 Pac. 1081 (affirming *People v. Baumgartner*, supra).

8. Entitled "An act to protect the public health from infection caused by exhumation and removal of the remains of deceased persons." See HEALTH.

9. *People v. Dalton*, 58 Cal. 226, holding, also, that in accordance with the rule that an indictment is sufficient which describes an offense substantially in the language of the

statute defining it, an indictment under Penal Code, section 290, for violating a sepulture, which distinctly charged the defendant with having "disinterred and removed" the dead body of a human being without authority of law, and in effect charged that the defendant was not a relative or friend of the deceased who removed the body for reinterment, is sufficient.

10. Pen. Code, § 291. See PHYSICIANS AND SURGEONS, as to the right of physicians to obtain dead bodies for purposes of dissection.

11. See CEMETERIES, vol. 4, p. 1013.

§ 14. Interring in City Limits.—The provision of section 297 of the Penal Code making it a misdemeanor to bury in a city except in a cemetery, is a negative provision, and does not by inference confer the right to bury in the excepted cemeteries. That right was pre-existing, but was subject to be taken away by police regulations, and remained subject to that condition after the enactment of section 297 to the same extent as before. Hence, an ordinance which forbids burials in any place in the city and county of San Francisco is not in conflict with the code section, for so far as such ordinance forbids burials outside of those cemeteries, it is in strict accord with section 297; and so far as it forbids burials within those cemeteries, it is not in conflict, for that section gives no right to make such burials.¹²

12. *Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 226, 73 Pac. 987, wherein it is also said that it may be that the law supercedes the ordinance, so far as the territory embraced is the same in both, and that the ordinance is to that extent inoperative—if so, the only result would be that for the offense of burial in any place other than an established cemetery, the prosecution and punishment must be under the state law, and for a burial within such cemeteries, it must be under the ordinance which as to such territory is in force and effect. See *CEMETERIES*, vol. 4, pp. 1007, 1014.

DEAF, DUMB AND BLIND.

See *HOSPITALS AND ASYLUMS*.

DEATH.

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Cases are cited in this article to and including 187 Cal., 46 Cal. App. and 208 Pac.

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- 23. Personal Representative.

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- 24. In General.
- 25. Nonresidents—Aliens.
- 26. Dependency.

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- 27. In General.
- 28. Personal Representative.
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- 30. Joinder.

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- 31. Administration of Foreign Statutes.
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- 48. Instructions.
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77. In Foreign Jurisdiction.

I. PRESUMPTIONS—SURVIVORSHIP.

§ 1. Scope of Article.—It is obvious that it cannot be within the proper scope of one article to consider all the various questions which arise in relation to or in consequence of death. Accordingly, this article covers only the statutory and case law of California in regard to presumptions of death and survivorship, and statutory actions for wrongful death.¹ Such questions as the effect of the death of a party to an action on the right of action;² death pending appeal or after argument or submission of a case upon appeal,³ and civil death,⁴ are considered in other articles. Although negligence causing death is a most important question in actions for wrongful death, its treatment properly falls to another article,⁵ since the matter which constitutes negligence in actions for wrongful death is the same whether death results or not. Under other titles will be found discussions of such questions as the care which carriers should observe in protecting passengers;⁶ the liability of a master for the injury or death of a servant;⁷ and the rules pertaining to the liability of independent contractors.⁸ Proceedings to determine the fact of death under section 1723 of the Code of Civil Pro-

1. As to special provisions in the Civil Code, §§ 3347 and 3348, in regard to death through dueling, see DUELING.

2. See ABATEMENT AND REVIVAL, vol. 1, pp. 59-79.

3. See ABATEMENT AND REVIVAL, vol. 1, pp. 76-79, and APPEAL AND ERROR, vol. 2, pp. 232 and 974.

4. See PRISONS AND PRISONERS.

5. See NEGLIGENCE. But see *infra*, § 35, as to pleading negligence; *infra*, § 41, as to contributory negligence as a defense, and *infra*, § 46, as to burden of proof.

6. See CARRIERS, vol. 4, pp. 931-937.

7. See MASTER AND SERVANT; WORKMEN'S COMPENSATION.

8. See INDEPENDENT CONTRACTORS.

cedure, as well as proceedings founded upon the fact of death, such as the administration of estates, etc., are also treated elsewhere in this work.⁹

§ 2. Presumption as to Continuance of Life.—The law presumes that one once shown to be alive continues alive until either his death is proved or the rule applies by which death is presumed to have occurred, that is, at the end of seven years in which he has not been heard from.¹⁰ This presumption of life is received, in the absence of any countervailing testimony, as conclusive. The only exception to its operation is when it conflicts with the presumption of innocence, in which case the latter prevails.¹¹ It follows, therefore, that where the issue is upon the life or death of a person once shown to have been living the burden of proof lies upon the party who asserts the death.¹² Of course, in the case of an absent person from whom no tidings are received the presumption of life ceases at the end of seven years. To shorten this time there must be evidence of some specific peril to the life of the individual.¹³ And it would seem that the rule in California is that, in the absence of any evidence tending

9. See COTENANCY, vol. 7, p. 338; DESCENT AND DISTRIBUTION; effect of death of parties after delivery of escrow, see ESCROW; deeds to take effect on death, see DEEDS; EXECUTORS AND ADMINISTRATORS; PARTNERSHIP; WILLS, etc. As to dissolution of attachment by death of party, see ATTACHMENT, vol. 3, p. 536.

10. See *infra*, § 3.

11. *People v. Feilen*, 58 Cal. 218, 41 Am. Rep. 258 (stating the rule as expressed by Field, J., in *Montgomery v. Bevans*, 1 Sawy. 653, Fed. Cas. No. 9735, but not adopting the rule for the purpose of the decision). See, also, as supporting this rule: *Western Grain etc. Co.*

v. Pillsbury, 173 Cal. 135, 159 Pac. 423, and *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300.

12. *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; but after the lapse of seven years without intelligence concerning the person, the presumption of life ceases and the burden of proof is devolved on the other party. See, also, *People v. Stokes*, 71 Cal. 263, 12 Pac. 71 (stating that presumption of death is disputable and may, like the presumption of continued life, be overcome by other evidence).

13. *Western Grain etc. Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423; *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300.

to fix the time of death during the seven years' absence, a person unheard of is presumed to be alive until the expiration of the seven years.¹⁴

§ 3. Presumption of Death in General.—Among the disputable presumptions enumerated in section 1963 of the Code of Civil Procedure is the following: "That a person not heard from in seven years is dead."¹⁵ This is likewise a rule of common law.¹⁶ It is obvious from this rule that a jury is justified in presuming as a fact that a person is dead where the evidence shows that he has not been heard of for seven years although no proof is made of the actual death of such person.¹⁷ In the statute governing the validity of a subsequent marriage, however, such marriage is void "unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or

14. *Solomon v. Redona*, 34 Cal. App. Dec. 1039, 198 Pac. 643; citing *Western Grain etc. Co. v. Pillsbury*, 173 Cal. 135, 138, 159 Pac. 423; *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300. See *infra*, § 4, as to time of death.

15. Code Civ. Proc., § 1963, subd. 26; *Pacific Gold Dredging Co. v. Industrial Acc. Com.*, 184 Cal. 462, 13 A. L. R. 725, 194 Pac. 1; *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348; *Lesser v. New York Life Ins. Co.*, 35 Cal. App. Dec. 434, 200 Pac. 22; *Estate of Williams*, 5 Cal. Prob. Dec. 437 (as to legatee); *Estate of Ross*, 3 Cal. Prob. Dec. 500.

16. *Bennett v. Modern Woodmen of America*, 35 Cal. App. Dec. 139, 199 Pac. 343.

17. *Estate of Ross*, 140 Cal. 282, 73 Pac. 976 (where presumption that father of pretermitted child died before making of will of ancestor arose through his absence for over seven years prior to the making thereof); *People v. Stokes*, 71 Cal. 263, 12 Pac. 71 (prosecution for adultery, stating that there is no presumption of law that life will not continue for any period, however long); *Garwood v. Hastings*, 38 Cal. 216 (where dissenting opinion objected to application of presumption on testimony of wife, since wife had endeavored to conceal herself from her first husband, whose existence was in issue); *Estate of Williams*, 5 Cal. Prob. Dec. 437 (stating that any competent evidence is sufficient and makes out a prima facie case if undisputed).

believed by such person to be dead at the time such subsequent marriage was contracted."¹⁸

It must be borne in mind that the statutory presumption of death is expressly made disputable. It has therefore been held erroneous for a trial court to change it to a conclusive presumption in instructing a jury.¹⁹

§ 4. Presumption as Establishing Time of Death.—It is uniformly held that the presumption of death which the law deduces from the fact that a person has not been heard from in seven years does not arise until the expiration of the seven years, unless there are circumstances in evidence to quicken the time.²⁰ By this presumption the fact of the death of a person may be proved but not the date of his death at any particular time during the seven year period.¹ If it becomes important to establish the

18. Civ. Code, § 61, subd. 2; Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000; Estate of Richards, 133 Cal. 524, 65 Pac. 1034 (where a husband left his first wife in another state and came to this state, in the absence of any proof or repute of her death, there is no presumption that he believed her dead after an absence of five years on his part, but the presumption is to the contrary; and a second marriage by him, in this state, without any prior divorce or annulment of the former marriage, is unlawful); People v. Feilen, 58 Cal. 218, 41 Am. Rep. 258 (prosecution for bigamy). See BIGAMY, vol. 4, p. 341.

19. Darrell v. Mutual Benefit Life Ins. Co., 44 Cal. App. 523, 186 Pac. 620, holding an instruction erroneous which stated that finding should be for plaintiff if evidence showed that insured was absent for seven years without being heard from, all other

facts being such, in regard to payment of premium, etc., as would justify a recovery.

20. Western Grain etc. Co. v. Pillsbury, 173 Cal. 135, 159 Pac. 423; Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348; Solomon v. Redona, 34 Cal. App. Dec. 1039, 198 Pac. 643 (action for partition of real property).

1. Benjamin v. District Grand Lodge, etc., 171 Cal. 260, 152 Pac. 731 (holding that by offering evidence of absence plaintiff did not prove that deceased died subsequent to a certain time within the seven years and thereby defeat her cause of action); Linneweber v. Supreme Council, 30 Cal. App. 315, 158 Pac. 229.

It would seem that in the absence of any proof as to the time of death the presumption should be that the deceased died at the expiration of the seven year period. Since the presumption is one established by

precise time of death during the seven year period this must be done by evidence of some sort to be laid before the jury.² This evidence may not be sufficient to enable a suit to be brought which depends upon the establishing of the fact of the death of the deceased before the expiration of the seven year period, although sufficient to support a finding as to the exact date of death in a suit brought after the expiration of the seven years. It follows that in such a case the statute of limitations as to bringing an action does not commence to run from the date of death as found by the court but from the time the presumption of death arose under the statute.³

§ 5. Presumption Arising Through Facts and Circumstances.—The rule as to presumption of death from absence is not exclusive. It has been held that before the expiration of the seven year period, in certain instances, circumstantial evidence may be introduced tending to show

an arbitrary rule of law, it should extend both to the fact of death and time of death. See *Western Grain etc. Co. v. Pillsbury*, 173 Cal. 135, 138, 159 Pac. 423; *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300.

In cases where the time of death has been found to be at a date prior to the expiration of the seven year period, there were facts or circumstances which justified such finding.

2. *Solomon v. Redona*, 34 Cal. App. Dec. 1039, 198 Pac. 643, where the court states that there are two rules as to the effect of this presumption, one being that the person unheard of is presumed to be alive until the end of the seven year period and the other that there is no presumption that death occurred during the seven years' absence, but the burden is upon the party claiming that it occurred on or be-

fore a particular time within the seven years to prove the precise time of death—also that it would seem that this distinction is more apparent than real inasmuch as the effect of each rule is the same, i. e., to throw the burden of proof as to the date of death on the party who contends that it occurred prior to the expiration of the seven year period.

3. *Benjamin v. District Grand Lodge, etc.*, 171 Cal. 260, 152 Pac. 731 (action on insurance policy issued by lodge, the court holding that after proof of death by reason of the presumption from absence, a letter written by decedent is competent evidence to establish the date of death); *Linneweber v. Supreme Council*, 30 Cal. App. 315, 158 Pac. 229 (where aged man disappeared at time of fire and earthquake in San Francisco).

the fact of death from which evidence a jury may be justified in finding that death took place at a particular time.⁴ As to what circumstances will quicken the time so as to raise the presumption of death before the expiration of the statutory period no rule can be laid down that will apply to all cases.⁵ Thus it has been held that where absence from any other cause than death is inconsistent with the nature of the person absent, and the facts point to the reasonable conclusion that death has occurred, the jury is justified in finding death as a fact.⁶ Again,

4. *Western Grain etc. Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423 (action under Employers' Liability Act where circumstances such as blood, torn clothing, footprints, etc., indicated that person had been killed); *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (where circumstances indicate suicide it is a question of fact for the determination of the jury); *Lesser v. New York Life Ins. Co.*, 35 Cal. App. Dec. 434, 200 Pac. 22 (holding that where the jury finds the fact of death from the evidence introduced by the plaintiff it is competent for it to find the exact date of death); *Estate of Luesmann*, 2 Cof. Prob. Dec. 531 (where mother of child left house believing her child was going to die and all facts indicated that she ended her life because she no longer cared to live); *Estate of Kustel*, 2 Cof. Prob. Dec. 1; but see *Benjamin v. District Grand Lodge, etc.*, 171 Cal. 260, 152 Pac. 731 (holding that mere disappearance coupled with a letter showing intent to commit suicide does not constitute satisfactory proof of death, although competent to show date of death

when presumption has arisen through absence).

5. *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348 (holding that where the proof of death consisted of circumstantial evidence, indicating suicide in disappearing from a steamer at night, leaving coat and hat and valise and a letter to the captain expressing his intention to go over the side of the steamer and so to get rid of the troubles of life and avoid a funeral, the letter is admissible in evidence as part of the *res gestae*, and is not objectionable on the ground that it is self-serving); *Estate of Kustel*, 2 Cof. Prob. Dec. 1.

6. *Lesser v. New York Life Ins. Co.*, 35 Cal. App. Dec. 434, 200 Pac. 22, holding that a jury is justified in finding the fact of death before the expiration of the seven year period where a man respected in his community, fond of and devoted to his family, living in comfortable financial circumstances, with no known reason to induce him to leave his family, disappears and is never again heard of, there being certain circumstances which justify a finding that he lost his life while bathing in the ocean.

it has been held that one who has sailed on a vessel which has not been heard of for such a length of time as would be sufficient to allow information to be received from any part of the world to which the vessel or those on board might have been expected to be carried, and who has not been heard of since the vessel sailed, may be presumed to be dead.⁷ However, it is clear that if the person at the time he was last seen was a fugitive from justice, was a bankrupt, or if from other causes it would be improbable that he would be heard from even if alive, then no inference of death will be drawn.⁸

§ 6. Rebuttal of Presumption.—The statutory presumption of death, based upon seven years' absence, is a controvertible one, and may be rebutted by proof of facts and circumstances sufficient to overcome it.⁹ To illustrate: In an action such as one to recover on an insurance policy, the burden of proving the death of the insured rests with the plaintiff. Upon proof of facts showing that the insured has not been heard from within seven years, the disputable presumption of death arises. The burden of overcoming the effect of the presumption is then cast upon the defendant. Such presumption may be overcome by showing that the insured is alive or it is proper to produce evidence of a circumstantial nature tending to show that his absence and silence are to be accounted for, not because of death, but for some other reason, and in this connection it is proper to offer evidence as to the circumstances under which the absent person left, his reasons, if

7. *Estate of Kusted*, 2 Cof. Prob. Dec. 1, where deceased set sail on the night of a violent storm and was never again heard of.

8. *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; *Lesser v. New York Life Ins. Co.*, 35 Cal. App. Dec. 434, 200 Pac. 22 (stating this proposition).

9. *People v. Stokes*, 71 Cal. 263, 12 Pac. 71 (prosecution for adultery); *Darrell v. Mutual Benefit Life Ins. Co.*, 44 Cal. App. 523, 186 Pac. 620; *Kaufmann v. New York Life Ins. Co.*, 44 Cal. App. 313, 186 Pac. 360 (action on life insurance policy).

any, for leaving or concealing his whereabouts, the state of his health, his age and any other relevant facts which may account for his absence upon some theory other than death. It is not always necessary to prove that the absent person is alive. It is only necessary to produce evidence of such weight as will, in the minds of the jury, overcome the force of the disputable presumption of death.¹⁰ And it is clear that if, after the plaintiff introduces evidence tending to show the death of the absent person at a particular time, the defendant is able to show that such person has been seen after the supposed date of death, such fact is admissible in rebutting the plaintiff's case.¹¹

§ 7. Efforts to Find Absent Person.—Although the statute specifically states that a presumption of death arises by reason of a person's continued absence for a period of seven years, there is at least a suggestion in certain recent decisions of the appellate courts that in order to prove the death of such person it must be shown that diligent inquiries as to his whereabouts have been made without avail.¹² Whether such inquiries were diligent depends upon all the facts and circumstances of the case.¹³ It is clear that where the trial court has found upon the issue as to whether the inquiries were diligent and there is some evidence to support such finding, it will not be disturbed on appeal if sound as a matter of law.¹⁴ Thus the finding

10. *Darrell v. Mutual Benefit Life Ins. Co.*, 44 Cal. App. 523, 186 Pac. 620, per Bardin, Judge pro tem. See **INSURANCE**.

11. *Lesser v. New York Life Ins. Co.*, 35 Cal. App. Dec. 434, 200 Pac. 22, per Sturtevant, J. See *supra*, § 3, as to instruction changing disputable presumption of death to conclusive presumption.

12. *Kaufmann v. New York Life Ins. Co.*, 44 Cal. App. 313, 186 Pac. 360; *Brown v. Grand Lodge, A. O.*

U. W., 13 Cal. App. 537, 110 Pac. 351, where court stated that should it give full force to the contention of the appellant that such diligence must be shown, still the record exhibited sufficient diligence.

13. *Brown v. Grand Lodge A. O. U. W.*, 13 Cal. App. 537, 110 Pac. 351.

14. *Kaufmann v. New York Life Ins. Co.*, 44 Cal. App. 313, 186 Pac. 360, action on insurance policy.

of the trial court as to the fact of death has been upheld where it was found upon sufficient evidence that inquiries had been made at all places where the missing person might reasonably be expected to be found if alive and every source of information had been exhausted in efforts to locate him but without avail.¹⁵

§ 8. Contracts Contravening Presumption.—As has already appeared, the presumption that a person not heard from for a period of seven years is dead is a rule of common law and of the statutory enactment of California.¹⁶ A clause in a contract which if enforced would render nugatory this presumption and make it practically impossible to make proofs of death in cases within the recognized experience of man and thereby work a substantial injustice would, it has been said, be invalid as not only unreasonable and violative of the statutory enactment but also as against the weight of public policy. Thus a clause in an insurance contract has been held to be against public policy which requires due proof of the fact of continued absence of insured and payment of all dues and assessments necessary to keep the certificate alive, for a period covering the full term of the member's expectancy of life according to certain mortality tables.¹⁷

§ 9. Proof of Death.—As has been pointed out, the burden of proof lies upon the party who asserts death where the issue is upon the life or death of a person.¹⁸ Any

15. *Brown v. Grand Lodge A. O. U. W.*, 13 Cal. App. 537, 110 Pac. 351.

16. See *supra*, § 3.

17. *Bennett v. Modern Woodmen of America*, 35 Cal. App. Dec. 139, 199 Pac. 343, per Waste, P. J.

See note, 17 A. L. R. 418, as to validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence. And see CON-

TRACTS, vol. 6, p. 98 et seq., as to contracts against public policy.

18. See *supra*, § 2, as to continuance of life, and § 6, as to rebuttal of presumption. See, also, *Western Grain etc. Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423, stating that where the jurisdiction of the industrial accident commission is dependent upon the establishment of the fact of death by violence, its award will be set aside if the evi-

facts or circumstances relating to the character, habits, condition, state of mind or any of those things which usually control the conduct of a man are competent evidence from which may be inferred the death of one absent and not heard from, whatever may have been the duration of his absence. The lapse of time between such acts and his disappearance is a matter relating rather to the weight than to the admissibility of the evidence concerning such acts,¹⁹ the very nature of such cases being that the weight of the evidence is a question for the jury.²⁰ Thus evidence of an attempt of decedent to commit suicide prior to his disappearance has been held to be admissible as a circumstance tending to show the mental condition of decedent at the time of his disappearance.¹ Hearsay information of the death derived from the immediate family of the deceased has been held to be sufficient *prima facie* to establish the fact.² It is not necessary, however, to offer any proof of death where the complaint is verified and contains an averment of that fact which is not sufficiently controverted by answer.³ Where proof of death is required in order to recover on a claim, such as a policy of insurance, such proof need not be furnished until the proof is possible under the circumstances of the case, and the statute of limitations does not commence to run until such proof is available.⁴

dence, in any view, is insufficient to justify the finding of death.

19. *Benjamin v. District Grand Lodge etc.*, 171 Cal. 260, 152 Pac. 731.

20. *Lesser v. New York Life Ins. Co.*, 35 Cal. App. Dec. 434, 200 Pac. 22.

1. *Benjamin v. District Grand Lodge etc.*, 171 Cal. 260, 152 Pac. 731.

2. *Anderson v. Parker*, 6 Cal. 197. See *Benjamin v. District Grand Lodge etc.*, 171 Cal. 260, 152 Pac.

731, action on insurance policy, where it was held to be admissible to show a letter containing a statement that letters of administration had been issued on estate of absent person, where such evidence was introduced simply to show that plaintiff had endeavored to make proof under terms of policy and was so limited by court.

3. *Anderson v. Parker*, 6 Cal. 197.

4. *Benjamin v. District Grand Lodge etc.*, 171 Cal. 260, 152 Pac. 731. See *INSURANCE*.

§ 10. Presumption of Survivorship.—Section 1963 of the Code of Civil Procedure recites among other disputable presumptions that

“When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules: First. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived; Second. If both were above the age of sixty, the younger is presumed to have survived; Third. If one be under fifteen and the other above sixty, the former is presumed to have survived; Fourth. If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived; if the sexes be the same, then the older; Fifth. If one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived.”⁵

An earthquake by which deaths were caused by the demolishing of brick buildings and by which the wing of a building was razed to the ground causing the death of its two occupants has been held to be a calamity within the meaning of this section when the question at issue was which of the two occupants survived the other.⁶ And the murder of husband and wife, perpetrated at the same time, has likewise been held such a calamity.⁷

§ 11. Proof of Survivorship.—The fact of survivorship must be established by a preponderance of evidence. If preponderating evidence is wanting to satisfy the court the statute of presumptions is applicable, but such pre-

5. Code Civ. Proc., § 1963, subd. 40; *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855 (where husband and wife were found murdered); *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; *Grand Lodge A. O. U. W. v. Miller*, 8 Cal. App. 25, 96 Pac. 22,

4 Cal. Prob. Dec. 321. See also cases cited in this section and *infra*, § 11.

6. *Grand Lodge A. O. U. W. v. Miller*, 8 Cal. App. 25, 96 Pac. 22.

7. *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855.

sumption is to be applied only where the relative times of the death of persons perishing by the same disaster cannot be shown by direct or circumstantial evidence or both. Where the evidence as to the relative times of the death of persons is conflicting, a finding of survivorship contrary to the legal presumptions will not be disturbed on appeal.⁸ However, the evidence supporting the finding must be sufficient to rebut the presumption. Thus it has been held that no presumption of survivorship of the wife arises from the fact that an order of a probate court granting letters of administration upon her estate recites that she was the "surviving wife" of her husband.⁹ The meaning of the statute in speaking of circumstances from which it can be inferred as to who died first is that there must be evidence relating to the death and the calamity and the particular facts which would justify a court or a jury in finding the fact as to who died first. If it is claimed that one of the parties died before the other it must be shown that such was the fact and the statute merely means that such fact may be proven like any other fact by circumstantial evidence. Circumstances from which the fact may be inferred must mean by inferences which are rational conclusions from the facts proven.¹⁰

8. *Estate of Loucks*, 160 Cal. 551, Ann. Cas. 1913A, 868, 117 Pac. 673, per Melvin, J.

9. *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741, holding that in such case it is error to refuse evidence aliunde upon the question of survivorship in a proceeding by her administrator to set aside the probate of her husband's will.

10. *Grand Lodge A. O. U. W. v. Miller*, 8 Cal. App. 25, 96 Pac. 22, per Cooper, P. J., stating that the statute does not mean circumstances which would show or which would tend to show probably that one died before the other. If the

matter is left to probability, then the statute settles the presumption.

See *Estate of Loucks*, 160 Cal. 551, Ann. Cas. 1913A, 868, 117 Pac. 673 (holding that medical witness may be asked to describe extent of injuries of one of the persons killed where it is shown that body was in same condition when he examined it as at the time of the accident); and *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855 (holding that the verdict of a coroner's jury is not admissible to show the time or manner of the death of a husband and wife who were murdered together).

II. ACTIONS FOR WRONGFUL DEATH.

Right of Action.

§ 12. **At Common Law.**—At common law a civil action for damages for the wrongful death of another could not be maintained by anyone.¹¹ Such a right of action is not an inherent one,¹² and it did not survive the death of either the person to or by whom the wrong was done.¹³ The common-law rule was *actio personalis moritur cum persona*—the person committing the wrongful act causing death was wholly immune from any action of a civil nature.¹⁴ Human life was considered to be of such a character that its wrongful destruction could not be measured in terms of money.¹⁵ Where, therefore, an action for wrongful death now exists it is the creature of statute,¹⁶ and exists only so far and in favor of such persons

11. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276 (holding that administrator cannot sue where there are no heirs); *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal. 434; *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35; *McLain v. Llewellyn Iron Works*, 37 Cal. App. Dec. 86, 204

Pac. 869; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Western Fuel Co. v. Garcia* (U. S.), 66 L. Ed. 97, 42 Sup. Ct. Rep. 89.

12. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989.

13. *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243. See *infra*, § 23, as to effect of death of wrongdoer on right of action. See *ABATEMENT AND REVIVAL*, vol. 1, p. 72.

14. *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243.

15. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149.

16. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *McLaughlin v. United Railroads*,

as the legislative power has declared.¹⁷ And the common-law rule exists except in so far as it has been modified or abolished by statute.¹⁸ A right of action for wrongful death was created in England by virtue of the famous Lord Campbell's Act,¹⁹ and similar statutes have been enacted in all of the states of the Union.²⁰

§ 13. Lord Campbell's Act.—The first statutory enactment in England giving a right of action for injuries causing death is known as Lord Campbell's Act passed in 1846.¹ It provides that whenever the death of any person is caused by the wrongful act, neglect or default of another, in such a manner as would have entitled the party injured to have maintained an action in respect thereof if death had not ensued, an action may be maintained if brought within twelve months after his death in the name of his executor or administrator, for the benefit of certain relatives, and the jury may give such damages as they may think have resulted to the prospective persons for whose benefit the action is brought; and the dam-

169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35; *McLain v. Llewellyn Iron Works*, 37 Cal. App. Dec. 86, 204 Pac. 869. See also *infra*, §§ 13-19.

17. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989 (holding that it cannot be said that there is no reasonable ground for the exclusion of husbands and collateral heirs of the third degree from the benefits of amendment of 1907 to section 1970 of the Civil Code, in regard to fellow-servant rule); *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas.

1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366. See *infra*, §§ 27-30, as to who may maintain action.

18. *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357.

19. Stats. 9 & 10 Victoria, c. 93; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149. See *infra*, § 13.

20. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149. See *infra*, §§ 14-16, as to statutes creating right in California.

1. 9 & 10 Victoria, c. 95; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 697; 113 Pac. 366.

ages so recovered, after deducting the costs not recovered from the defendant, shall be divided among the beneficiaries in such shares as the jury by their verdict may direct.² The statutes in the different American states, though varying greatly in details, follow generally this fundamental act.³ Thus there are differences in the nature of the cause of action which arises,⁴ and in the persons who may maintain the action and the damages which may be recovered.⁵ It has been said that Lord Campbell's act was intended to be penal. It had been found that persons causing death by negligence could not be convicted of manslaughter, and it was thought that in the interests of the public some punishment should be meted out to them.⁶

§ 14. Actions for Death of Child.—Section 376 of the Code of Civil Procedure provides that:

“A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action

2. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; 8 Ruling Case Law, p. 724.

3. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, §§ 27-30, as to parties who may maintain action; and *infra*, §§ 50-67, as to damages recoverable; and see *infra*, § 67, as to distribution of damages.

4. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Burk v. Arcata & Mad R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065.

5. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, § 64, as to exemplary damages.

6. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, § 64, as to exemplary damages.

7. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, § 64, as to exemplary damages.

8. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, § 64, as to exemplary damages.

may be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.”⁷

The statute presents in its practical application some peculiar features. The original Practice Act, in section 11, declared that “A father, or, in case of his death or desertion of his family, the mother may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward.”⁸ It was held that this section merely designated the person authorized to sue for such injury, if subsequent legislation should give a right of action therefor.⁹ It was also held that the act of 1862 giving a right of action to the personal representative of the deceased for an injury causing the death of any person,¹⁰ included both minors and adults and, by implication, repealed section 11 as to the parties who could bring action.¹¹ In England, and in nearly all of the states, the statute makes no distinction between minors and adults but gives the right of action for the death of any person, whatever his age, to, or for the use of, the heirs. And

7. *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234; *Lapique v. Agoure*, 170 Cal. 79, 148 Pac. 517; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Delatour v. Mackay*, 139 Cal. 621, 73 Pac. 454; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Cleary v. City R. R. Co.*, 76 Cal. 240, 18 Pac. 269 (overruled in *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, as to damages which can be recovered); *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal. 320; *Benjamin v. Eldridge*, 50 Cal. 612;

Young v. Fresno etc. Irr. Co., 24 Cal. App. 286, 141 Pac. 29; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010.

8. G. & S. Comp. Laws, 1850-53; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366.

9. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Kramer v. San Francisco Market St. R. Co.*, 25 Cal. 434.

10. Stats. 1862, p. 47.

11. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal. 434.

section 377 of the Code of Civil Procedure, in its original form, included minors as well as adults and of course gave a right of action for the death of minors or adults alike to the heirs or personal representative. Nevertheless, in enacting the codes, the language of section 11 was reproduced verbatim, as the original section 376 of the Code of Civil Procedure. In 1874 section 377 was amended by the insertion of the words "not being a minor" after the word "person" in the first line of the first sentence, thus excluding minors from its operation, and section 376 was amended to its present form, inserting the word "minor" before the word "child," but otherwise retaining the peculiar language of the Practice Act. Section 376 as thus amended gives a right of action for a negligent injury causing the death of a minor, but not in all cases.¹²

§ 15. Actions for Death of Adult.—Section 377 of the Code of Civil Procedure has been a part of the code since 1874. It provides that,

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible

12. For example, if the minor leaves no parent or guardian no right of action arises under either section although he may leave dependent wife, children, or brothers and sisters. Nor is it stated for whose benefit the guardian may sue when the action is by the guardian, although it is difficult to perceive how any damage could be allowed where he is not suing for the damage suffered by the heirs and for their benefit. Other anomalies have been pointed out which, it is said, show that section 376 was not carefully or skillfully

drawn and which suggest that caution is necessary in its construction and application. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366, per Shaw, J. See *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146, where the court refers to the *Bond* case and says any intimations therein to the effect that no action can be brought if the infant has neither parent nor guardian are pure dictum, as the action was brought by the mother.

for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."¹³

Since, as has already been pointed out, a right of action for wrongful death did not exist at common law, it is only by virtue of some such statute as this that an action for the death of a person can be maintained in California by his heirs or representatives.¹⁴ The courts have said that, to understand the scope and purpose of the statute, it is essential to trace some of its history. In 1862 an act was adopted "requiring compensation for causing death by wrongful act, neglect or default."¹⁵ This statute provided that where the death of a person is caused by the wrongful act, neglect or default of another, and such wrongful act would have entitled the person injured, had he lived, to have maintained an action for damages against the tort-feasor, then such person shall, notwithstanding the death of the party injured, be liable in an action which must be brought by the personal representatives of such deceased person for the benefit of his widow and next of kin. The act also provided that the amount recovered should be distributed to the heirs in the proportions pro-

13. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Munro v. Pacific Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550; *Cox v.*

San Joaquin Light etc. Co., 33 Cal. App. 522, 166 Pac. 578; *Western Fuel Co. v. Garcia*, 255 Fed. 817; *Kaneko v. Atchison, T. & S. F. Ry. Co.*, 164 Fed. 263; *In re California Nav. & Imp. Co.*, 110 Fed. 670. See also cases cited throughout this article in considering the construction, operation and application of this section.

14. *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357. See *supra*, § 12.

15. Stats. 1862, p. 447, c. 330; *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal. 434; *Gregory v. Southern Pac. Co.*, 157 Fed. 113.

vided by law for the distribution of personal property left by persons dying intestate;¹⁶ and further, that the jury could award such damages, pecuniary and exemplary, as they deemed fair and just,¹⁷ and that the action should be commenced within two years after the death.¹⁸ The statute was revised and incorporated in the code and reached its present form in 1874. It will be noted that the statute of limitations is now contained in a separate chapter of the Code of Civil Procedure.¹⁹ Numerous other differences apparent upon comparison are pointed out in other sections of this article.²⁰

§ 16. Employer's Liability Acts.—Prior to 1907, in the chapter dealing with the relation of master and servant, section 1970 of the Civil Code contained terms limiting the responsibility of the employer when the servant suffered injury through a risk incident to his employment or through the negligence of a fellow-servant. In 1907 the legislature made extensive additions to the section, enlarging the liability of the employer.¹ As amended the section contains the following provision:

“When death, whether instantaneous or otherwise, results from an injury to an employee received from the wrongful act, neglect or default of an agent or officer of the employer, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, chil-

16. *Gregory v. Southern Pac. Co.*, 157 Fed. 113, per Wolverton, Dist. J. Under the present section damages are distributed according to pecuniary injury suffered by heirs. See *infra*, § 67.

17. *Gregory v. Southern Pac. Co.*, 157 Fed. 113.

Under the present provision only pecuniary damages may be awarded. See *infra*, § 51.

18. *Gregory v. Southern Pac.*

Co., 157 Fed. 113. The statute of limitations is now one year, see *infra*, § 75.

19. See Code Civ. Proc. § 340, subd. 3. See *infra*, § 75.

20. See *infra*, §§ 27-30, as to parties plaintiff, §§ 68-74, as to evidence of damages, etc.

1. *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac.

550.

dren, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery.'"²

These amendments also greatly modify the earlier rules touching the assumption of risks and nonliability for injuries occasioned by the negligence of a fellow-servant, giving a right of recovery in such cases under circumstances where no such right before existed.³

Workmen's compensation.—By virtue of section 21 of article XX of the constitution, which authorized the legislature to pass laws making the relation of employer and employee subject to a system of rights and liabilities different from those prevailing at common law, provision may be made for compensation not only to the employee who survives his injury but also to his heirs or dependents in case of his death, his injury proving fatal.⁴ And it has been said in regard to legislation enacted under this constitutional authority that the analogies of the common law may not be applied too closely, since this new scheme undertakes to supersede the common law altogether and to create a different standard of rights and obligations covering the entire field of injury to workmen in the course of their employment.⁵

§ 17. Effect of Code Provisions.—Although the courts at first expressed no opinion as to the effect of section

2. Civ. Code, § 1970; *Western Fuel Co. v. Garcia*, 256 Fed. 817, quoting at length from *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724 in regard to effect of amendment in section 1970, Civ. Code.

3. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Cox v. San Joaquin Light etc. Co.*, 33 Cal. App. 522, 166 Pac. 578. See *infra*, § 17, for further discussion of effect this section has on § 377 of the Code of

Civ. Proc. See MASTER AND SERVANT.

4. *Moore Shipbuilding Corp. v. Industrial Acc. Com.*, 185 Cal. 200, 13 A. L. R. 676, 196 Pac. 257; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E, 390, 156 Pac. 491. See WORKMEN'S COMPENSATION.

5. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E, 390, 156 Pac. 491, per Sloss, J.

1970 of the Civil Code on section 377 of the Code of Civil Procedure, in regard to the bringing of actions for the wrongful death of employees caused by the negligence of the employer,⁶ it is now settled that section 1970 of the Civil Code is to be construed with section 377, not as superseding it.⁷ Section 377 still remains in full force, gives a right of action and fixes the measure of recovery in all cases.⁸ When so construed it means that where section 1970 has created rights of action growing out of the relationship of employer and employee, which did not formerly exist, such rights of action by the representatives of an employee who has lost his life may be prosecuted for the benefit of the class limited and designated in the section itself.⁹ So far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action.¹⁰ As to other rights of action, viz., those not created by the amendments to section 1970, but which existed prior to such amendments, the limitations of that section have no effect. And it is clear that section 377 still includes with all other classes employees whose deaths are negligently caused by the employer himself.¹¹ Thus it has been held that a cause of action

6. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989; *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550 (where question was left undecided).

7. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724 (stating that it would require very direct and positive language to justify the court in deciding that § 1970 took away a right of action from certain heirs of deceased employees unless they happened to be dependent); *West-*

ern Fuel Co. v. Garcia, 255 Fed. 817.

8. *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724.

9. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724. See MASTER AND SERVANT.

10. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989.

11. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348, per Angellotti, C. J.; *Kaneko v. Atchison, T. & S. F. Ry. Co.*, 164 Fed. 263 (stating that

founded upon the employer's neglect in furnishing the employee an unsafe place in which to work is not created by section 1970, but is one that exists under the statutory provision of the earlier section of the Code of Civil Procedure,¹² and a personal representative of the deceased employee may successfully maintain the action provided by section 377 in every case where a right existed independent of the amendments to section 1970, made in 1907.¹³

§ 18. Validity and Construction of Statutes.—It has been stated that the language of the California statute, giving a right of action for wrongful death¹⁴ is broader than the English statute¹⁵ and differs from the statutes of many other states.¹⁶ It has therefore been held that rights under section 377 are to be defined, not by what other courts have said touching their own statutes, but from the meaning and intent of the California law derived from a reading of it.¹⁷ "Many considerations of public policy

cases applicable to employers and employees would also be applicable to cases where such relationship did not exist).

12. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724.

13. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724. See *infra*, § 26, as to necessity for condition of dependency and *infra*, § 72, as to evidence.

14. Code Civ. Proc., § 377. See *supra*, § 15.

15. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513, holding that

California statute creates an entirely new cause of action in favor of the heirs. For *Lord Campbell's Act*, see *supra*, § 13.

16. In *re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97; *Earley v. Pacific etc. Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513. See *supra*, § 12.

17. In *re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97 (holding that damages were to be distributed among heirs according to damage suffered by each); *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513, per *Henshaw J.* (as to survival of right of action of injured person or whether statute creates an entirely new cause of action in favor of the heirs and holding in favor of latter proposition).

affect the question of the propriety and extent of such laws, the weight and effect of which, and the method of meeting or avoiding them, are matters resting exclusively in the legislative discretion. The probable number of husbands, or of collateral heirs of the third degree, who may suffer damage from such deaths, their probable necessitous circumstances and the consequences of extending the right to a more numerous and remote class, are among the circumstances to be considered. The decision of the legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor."¹⁸ The right of action for wrongful death given by sections 376 and 377 of the Code of Civil Procedure must be construed in the light of subsequent legislation embodied in the Workmen's Compensation Act, which provides that the recovery pursuant to the provisions of the act shall be exclusive. It therefore follows that in an action against an employer for the death of an employee it must appear that such employee belongs to one of the classes excepted by such act.¹⁹

§ 19. Nature of Action.—The action given by the California statute is, in general, the same as that accorded by Lord Campbell's Act. It is a new action—that is, one that had not previously obtained under the common law—and not a continuation or revival of an old action or one that subsisted prior to the death. It is founded upon the injury causing death as it affects the heirs and personal representatives and not as it affects the decedent individu-

18. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 192 Pac. 989, per Shaw, J. See CONSTITUTIONAL LAW, vol. 5, p. 670, as to discretion of legislature, and pp. 816, 844, as to class legislation. See *infra*, § 67,

as to distribution of damages, as affected by method of distribution in other states.

19. *McLain v. Llewellyn Iron Works*, 37 Cal. App. Dec. 86, 204 Pac. 869.

ally.²⁰ In some states the acts are but statutes of survivorship. They carry over to some living person after the death of the injured person precisely the right of action and precisely the right of recovery which the injured person would have had if his injuries had not resulted fatally.¹ But it is settled by many decisions in California that a plaintiff suing under section 376 or section 377 of the Code of Civil Procedure does not represent the right of action which the deceased would have had if the latter had survived the injury. A new right is created entirely distinct from that which was vested in the injured person before his death.² The right of action vested in a decedent abates and a new and independent

20. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503 (holding that after death of injured person pending his suit for damages for injuries, an amended complaint by his heir is in fact a discontinuance of the former action and the beginning of a new action for a new cause); *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065 (holding that damages can be given only for actual pecuniary loss of heirs); *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Munro v. Pacific Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Durkee v. Central Pac. R. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59; *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35; *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243; *Gregory v. Southern Pac. Co.*, 157 Fed. 113.

1. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513, per Henshaw, J.; *Burk v. Arcata & Mad River R. R.*

Co., 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065.

2. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183 (holding that only pecuniary loss suffered by plaintiff can be recovered); *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E, 390, 156 Pac. 491; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E, 390, 156 Pac. 491 (per Sloss, J., stating the proposition generally but stating that analogies of common law cannot be applied too closely to new scheme in regard to compensation under employer's liability provisions); *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *The Dauntless*, 129 Fed. 715, 64 C. C. A. 243 (holding that § 813, Code Civ. Proc., giving liens on vessels for injuries caused by them, does not give right to lien for causing the death of a person, and an action in rem cannot be maintained to recover such damages).

cause of action for damages for his death immediately arises in favor of the heirs or personal representatives.³ Such right of action is wholly independent and it is no less independent because it has its origin in the same tort.⁴ It could not, it has been reasoned, be a continuation of the right which the injured man had for the injury, for the loss to his heirs does not accrue until he dies.⁵ But one action is permitted, and that action may be brought either by the heirs of the deceased or by his personal representatives.⁶

Grounds and Conditions Precedent.

§ 20. **In General.**—The principle is clear that if there was no cause of action for the injury in the deceased had he lived the heirs have no right of action for his death.⁷ Thus there can be no right of action for wrongful death where the owner of land wrongfully held by another enters and expels the occupant but makes use of no more force than is reasonably necessary to accomplish this.⁸ Similarly it has been held that where the obligation is founded on the relationship of master and servant, existing be-

3. *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544; *Tann v. Western Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243. As to proper parties plaintiff, see *infra*, §§ 27-30.

4. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513.

5. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. As to effect of nature of action on damages which can be recovered, see *infra*, § 50 et seq.

6. See *infra*, § 43; and also *infra*, §§ 27-30.

7. *Burnham v. Stone*, 101 Cal. 164, 35 Pac. 627; *Good v. City of San Bernardino*, 33 Cal. App. Dec. 331, 193 Pac. 790 (where deceased was engaged in unauthorized employment on municipal property); *Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104.

8. *Burnham v. Stone*, 101 Cal. 164, 35 Pac. 627, holding that the fact that a judgment for the possession of real property is fraudulently obtained does not render an officer a trespasser who executed a writ regular on its face, issued on such judgment.

See ASSAULT AND BATTERY, vol. 3, pp. 188, 189; FORCIBLE ENTRY AND DETAINER; TRESPASS.

tween the deceased and the defendant, if there was no breach of duty warranting recovery by the servant had he lived, then it must follow that the defendant committed no tort and is not liable to the heirs of deceased.⁹

Under the California statute the injured person might survive long enough to sue and recover damages or to settle with the wrongdoer and then by his death a new cause of action would accrue to his heirs.¹⁰ But the right of action of the heirs is not affected or barred by the failure of the deceased to sue in his lifetime.¹¹

§ 21. Proximate Cause.—In actions for wrongful death as in the case of actions for personal injuries generally,¹² it is essential to a recovery that the wrongful act, neglect or default of the defendant should have been the proximate cause of the injury resulting in death.¹³ However,

9. *Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104. See **MASTER AND SERVANT**.

10. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, § 42, as to recovery by deceased as bar to action.

11. *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243.

12. See **NEGLIGENCE**.

There are in the reports many cases of actions for wrongful death where the only questions involved were those of negligence in the particular circumstances. Such questions are treated in appropriate articles in this work, such as **CARRIERS**; **MASTER AND SERVANT**; **RAILROADS**, etc.

13. *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36; *Western States Gas etc. Co. v. Bayside L. Co.*, 182 Cal. 140, 187 Pac. 735

(where piling of lumber in streets constituted a public nuisance and death of deceased was proximately caused by falling of lumber); *Muller v. Standard Oil Co.*, 180 Cal. 260, 180 Pac. 605 (holding that act of plaintiff and not defendant was not proximate cause of death); *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348 (negligence of foreman in not warning workers of danger in not warning workers of danger in drilling in hole in which unexploded dynamite had been left imputed to master); *Miller v. Pacific Electric Ry. Co.*, 169 Cal. 107, 145 Pac. 1023 (where negligence was proved); *Andrews v. Valley Ice Co.*, 167 Cal. 11, 138 Pac. 699 (where deceased's contributory negligence precluded recovery); *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544 (holding that violation of ordinance as to rate of speed is evidence of negligence); *Flora v. Bimini Water*

to hold a wrongdoer for a tortious act whereby he causes the death of another it is not necessary that such act be the sole proximate cause of the death.¹⁴ Although the

Co., 161 Cal. 495, 119 Pac. 661 (where insufficient showing was made as to negligence of defendant in connection with the drowning of deceased); *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700 (in which questions as to attractive nuisances, contributory negligence, etc., arose in action by mother of two minor children for their death caused by shock of electricity); *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 14 Ann. Cas. 1159, 14 L. R. A. (N. S.) 913, 93 Pac. 82 (involving liability of party who lets contracts and independent contractor); *Shade v. Bay Counties Power Co.*, 152 Cal. 10, 92 Pac. 62 (where deceased voluntarily placed himself in close proximity to a wire carrying a high voltage); *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760 (holding that in the absence of proof there is no presumption of negligence arising from the fact that a horse ran away); *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106 (where court held that person committing negligent act was not servant of defendant but independent contractor); *Lemasters v. Southern Pac. Co.*, 131 Cal. 105, 63 Pac. 128 (where contributory negligence of deceased prevented recovery); *Studer v. Southern Pacific Co.*, 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942 (where injury could not have occurred except for the wrongful act of deceased which contributed to the injury, negligence of defendant in not giving warning that

train was to start held not sufficient to justify recovery); *Rodgers v. Central Pac. R. R. Co.*, 67 Cal. 607, 8 Pac. 377 (where question arose whether falling of bridge was due to act of God); *Gay v. Winter*, 34 Cal. 153; *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290 (stating that the gravamen of the action under section 377 of the Code of Civil Procedure is the fact of the death of the injured person by negligence, and in the case of a carrier whether or not the deceased was a gratuitous passenger or one for reward is important only in considering the degree of care required by the carrier); *Alameda County v. Tieslau*, 44 Cal. App. 332, 186 Pac. 398; *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808; *Whitney v. Northwestern Pac. R. R. Co.*, 39 Cal. App. 139, 178 Pac. 326; *Foley v. Northern California Power Co.*, 14 Cal. App. 401, 112 Pac. 467 (where question arose as to whether negligence of deceased in picking up live wire was such as to prevent plaintiffs recovering for his death); *Williams v. San Francisco etc. Ry. Co.*, 6 Cal. App. 715, 93 Pac. 122; *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830 (holding that there was sufficient evidence to show that death was due to negligence of defendant as proximate cause); *Brown v. Central Pac. R. Co.*, 2 Cal. Unrep. 730, 12 Pac. 512.

14. *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243, where cerebral meningitis as a result of

misconduct or negligence of the deceased may have contributed remotely to his injury, if the defendant's wrongful act, neglect or default was the immediate cause of the injury and if with the exercise of prudence he might have prevented it he is not excused.¹⁵

The statute in permitting a recovery by the heirs of the deceased has not changed the law respecting negligence,¹⁶ and the plaintiff must therefore establish by a preponderance of evidence the negligence upon which he relies.¹⁷

Persons Liable.

§ 22. In General.—Sections 376 and 377 of the Code of Civil Procedure in regard to actions for the injury or death of a child or of an adult provide that such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, then also against such other person.¹⁸ In accordance with the principle that the liability of two or more persons who jointly engage in the same tort is joint and several,¹⁹ it has been held that it

assault proximately concurred with pneumonia in causing death.

15. *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 63 L. R. A. 238, 74 Pac. 15.

16. *Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104.

17. *Robinson v. Western States Gas & Electric Co.*, 184 Cal. 401, 194 Pac. 39 (in the absence of direct evidence such circumstances should be shown as would justify the inference that death was due to the wrongful act of defendant); *Diller v. Northern California Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359 (however, certain facts standing alone may be sufficient to make out a prima facie showing of negligence); *Schneider v. Market*

Street Ry. Co., 134 Cal. 482, 66 Pac. 734 (holding that it is sufficient for plaintiff to show in the first instance that the injury resulted from the negligence of defendant).

See NEGLIGENCE; and see *infra*, § 46.

Ordinarily, the question of whether the defendant was negligent on the circumstances disclosed is a question for the jury. *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361.

See NEGLIGENCE.

18. See *supra*, §§ 14, 15.

19. *Grundel v. Union Iron Works*, 127 Cal. 438, 78 Am. St. Rep. 75, 47 L. R. A. 467, 59 Pac. 826. See *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 Pac. 29 (discussing the

is not necessary to bring suit against all of several defendants as copartners when a cause of action for wrongful death exists against a copartnership. The several partners may be sued individually if so preferred.²⁰ The rules pertaining to a principal's responsibility for his agent's negligence or omission are applicable in actions for wrongful death.¹ These questions are fully discussed in other articles in this work.²

§ 23. Personal Representative.—It is elementary that no action can be sustained against an executor or administrator as such on a penal statute, nor when the cause of action is founded upon any malfeasance or misfeasance where the complaint imputes a tort done to a person or goods of another by the testator or intestate.³ This prohibition applies with equal force when there is an attempt to bring an action for wrongful death against the executor or administrator of the tort-feasor.⁴ It is obvious that such statutes as section 377 of the Code of Civil Procedure modify the common law only to the extent of giving a right of action for damages caused by the death

liability of several persons all being negligent); and *Lang v. Dilley & Thurston Co.*, 20 Cal. App. 223, 128 Pac. 1028 (stating that an action cannot be maintained against several tort-feasors as defendants jointly where there has been no concert of action or unity of design among them; yet upon the other hand, where a direct personal injury is occasioned by the separate but concurring negligence of two or more persons at one and the same time an action will lie against one or all of them). See **NEGLIGENCE**.

20. *Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. 970; and this rule applies where the tort is committed by an agent or servant of the firm. See **PARTNERSHIP**.

1. *Longuy v. La Société Française de Bienfaisance Mutuelle*, 35 Cal. App. Dec. 9, 198 Pac. 1011 (where question arose as to whether student nurse volunteering her services was acting within the scope of her employment); *Good v. City of San Bernardino*, 33 Cal. App. Dec. 331, 193 Pac. 790 (holding where action is against municipality it must be shown that such municipality is acting through its duly authorized agents).

2. See **AGENCY**, vol. 1, p. 837 et seq.; **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS**.

3. See **EXECUTORS AND ADMINISTRATORS**.

4. *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357.

of a person to his heirs,⁵ and that they in no way purport to affect the settled rules as to abatement of personal actions by death. "The action provided is by the very words of the section, one 'against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person.' Nowhere in the statutes is there any intimation that such an action may be brought against any other person or persons than those so specified."⁶

Beneficiaries.

§ 24. In General.—Inasmuch as an action for wrongful death is a new right of action which arises upon the death of the person injured,⁷ the recovery is for the injury suffered by the heirs personally and not for injuries inflicted upon the deceased.⁸ It is therefore settled that such an action as is authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs—one by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative.⁹ The statute in employing the term "heirs" does not refer to those persons who would succeed to the money so recoverable if it were in the possession of the community as community property at the time

5. See *supra*, § 12.

6. *Clark v. Goodwin*, 170 Cal. 527, L. R. A. 1916A, 1142, 150 Pac. 357, per Angellotti, J. See ABATEMENT AND REVIVAL, vol. 1, p. 72.

7. See *supra*, § 19.

8. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.

See *infra*, §§ 50–67, as to damages.

9. In *re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97; *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330 (stating that the same is manifestly made to appear as to the persons

mentioned therein by the language used in Civ. Code, § 1970); *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Munro v. Pacific Coast Dredging Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Guidera v. Lapiana*, 35 Cal. App. Dec. 74, 289, 199 Pac. 557. In the statute of 1862 (see *supra*, § 15), it was provided that the "amount recovered by such personal representatives shall be for the exclusive benefit of the widow and next of kin of such deceased person."

of the deceased's death,¹⁰ but the word is used in its common-law sense and includes all persons capable of inheriting from a deceased person generally,¹¹ the persons designated not taking as heirs or by succession but as beneficiaries of the statute, which is framed upon the theory that the heirs always constitute the family of the deceased.¹² It is clear that in the absence of such heirs no action lies, since the right is purely statutory and is maintainable for the benefit of the heirs only.¹³

§ 25. Nonresidents—Aliens.—The right of a nonresident or alien heir to recover under such a provision as is contained in section 377 of the Code of Civil Procedure is well recognized, and it has been said that such right is supported by unanswerable reasoning and an overwhelming weight of authority.¹⁴ Section 377 contains no language excluding such heirs from its operation. Its words are comprehensive or unequivocal. It has therefore been said that to exclude nonresident aliens from the benefits of the section is to read into it a restriction which it does

10. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.

11. *Simoneau v. Pacific Electric R. Co.*, 159 Cal. 494, 115 Pac. 320; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550.

See *infra*, § 67, as to distribution of damages.

12. *Simoneau v. Pacific Electric R. Co.*, 159 Cal. 494, 115 Pac. 320.

13. *Kerrigan v. Market Street Ry. Co.*, 138 Cal. 506, 71 Pac. 621; *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Slaughter v. Goldberg*, *Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811.

See *infra*, § 36, as to necessity for pleading existence of heirs.

See *infra*, § 55, as to effect of death of widow before action is tried or where action is brought originally for benefit of children.

14. *Kaneko v. Atchison, T. & S. F. Ry. Co.*, 164 Fed. 263, per Wellborn, Dist. J.; *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348 (stating that it is not to be understood that the court intimates that Civ. Code, § 1970, in regard to liability of employer for death due by negligence of fellow servant, excludes such an alien); *Fong Lin v. Probert*, 33 Cal. App. Dec. 762, 195 Pac. 437 (where heirs resided in China).

not contain.¹⁵ And it has been held that a reviewing court is not justified in dismissing an appeal even though a state of war exists between two governments, and the heir bringing the suit is a nonresident alien enemy within the meaning of the rule precluding actions and recoveries by or for persons of that class. Such facts do not warrant a forfeiture of the heir's right of action. The rights of a nonresident alien enemy are simply suspended until the cessation of hostilities.¹⁶

It has been expressly held that an employer's liability act enacted under constitutional authority is not rendered unconstitutional by reason of the fact that under it the employer may be required to make payments to alien and nonresident dependents.¹⁷

§ 26. Dependency.—The action given by section 377 of the Code of Civil Procedure is one for the benefit of the heirs, and it lies, regardless of their condition as to dependency, for any pecuniary loss they may suffer by reason of the death.¹⁸ Thus it has been held that the right of recovery is not limited to minor children of a deceased ancestor.¹⁹ It has likewise been held that the statute is sufficiently liberal to include as a beneficiary a parent who

15. *Kaneko v. Atchison, T. & S. F. Ry. Co.*, 164 Fed. 263.

16. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348, stating that a dismissal of the appeal would in effect perpetually bar the heir from pursuing claim.

17. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Ann. Cas. 1917E, 390, 156 Pac. 491. See **WORKMEN'S COMPENSATION.**

18. *Shebley v. Peters*, 35 Cal. App. Dec. 462, 62 Cal. Dec. 217, 200 Pac. 364; *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Gonsalves*

v. Petaluma etc. Ry. Co., 173 Cal. 264, 159 Pac. 724; *Fong Lin v. Probert*, 33 Cal. App. Dec. 762, 195 Pac. 437; *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95.

See *infra*, § 51, as to amount that can be recovered, and §§ 50-54, as to nature of pecuniary loss.

19. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95. See *infra*, § 57.

has suffered an actual pecuniary loss by the death of an adult son.²⁰

The beneficiaries under section 1970 of the Civil Code are limited to the "widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated."¹ It is clear that under this section, in order to entitle a parent or brother or sister of the deceased to become a beneficiary, it must appear that such person was dependent upon the deceased for support.² However, where the action is by the heirs of an employee for his wrongful death against the employer and is one that can be maintained under section 377,³ it is not necessary that such heirs should have been actual dependents upon the deceased.⁴

Workmen's compensation.—The benefits of the workmen's compensation law are not provided as an indemnity for negligent acts committed or as compensation for legal damages sustained. That law is an economic insurance measure designed to prevent a sudden break in the contribution of the worker to society by his accidental death in the course of his employment. From this standpoint it makes no difference whether the workman's earnings are being distributed to those whose support he has voluntarily assumed, or to those who are legally entitled to such support. It is left to reasonable legislative discretion to determine what dependents shall become the distributees, and the court is not compelled to look to analogies of the common law or to the limitations of compensation acts in force at the time the constitutional provision was adopted to fix the measure of the legislative

20. *Peterman v. Northern Pac. Ry. Co.*, 105 Fed. 335. See *infra*, § 61.

1. *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550.

2. See *infra*, § 37, and *infra*, § 72.

3. See *supra*, § 17, as to effect of code provisions.

4. *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; *Gonsalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, 159 Pac. 724.

power thus conferred.⁵ The disposition of death benefits to be made in any particular case is based upon the respective needs of the dependents and is primarily a question of fact which rests largely in the discretion of the commission.⁶

Federal Employers' Liability Act.—The Federal Employers' Liability Act has been construed as intended only to compensate the surviving relatives of the deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit the action is given. It follows that there can be no recovery where it does not appear that the plaintiff was in any way dependent upon the decedent or had any reasonable expectation

5. *Moore Shipbuilding Corp. v. Industrial Acc. Com.*, 185 Cal. 200, 13 A. L. R. 676, 196 Pac. 257, per Sloane, J., holding that putative child supported by a man living in adultery with an undivorced wife—the mother of the child—was dependent under WORKMEN'S COMPENSATION ACT. See, also, *Robert Sherer & Co. v. Industrial Acc. Com.*, 182 Cal. 488, 188 Pac. 798 (holding child dependent where father had paid monthly sum for child's support, although child was in custody of divorced mother); *Continental Casualty Co. v. Pillsbury*, 181 Cal. 389, 8 A. L. R. 1110, 184 Pac. 658 (holding that wife separated from husband by reason of his desertion is entitled to compensation notwithstanding a decree entitling her to separate maintenance); *Temescal Rock Co. v. Industrial Acc. Com.*, 180 Cal. 637, 13 A. L. R. 683, 182 Pac. 447 (where ignorant persons lived together in belief that they were husband and wife the commis-

sion properly awarded compensation to the woman).

6. The court has therefore gone to the extent of holding that the commission may award the total amount of the death benefits to dependent children of the deceased by a woman with whom he was living at the time of his death, and who was not his wife, to the exclusion of his surviving wife, when the facts showed that such wife was separated from him, applying for a divorce without provision for support and not receiving any aid from him, even though the law would presume her to be wholly dependent upon him for support; *Perry v. Industrial Acc. Com.*, 176 Cal. 706, 169 Pac. 353. See, also, *London G. & A. Co. v. Industrial Acc. Com.*, 181 Cal. 460, 184 Pac. 864 (wife not living with her husband and applying for divorce without making application for alimony not entitled to recover as dependent).

See WORKMEN'S COMPENSATION.

of pecuniary benefit as a result of a continuation of his life.⁷

Parties Plaintiff.

§ 27. **In General.**—The California law relating to actions for wrongful death undoubtedly contemplates that they shall be brought either by the personal representatives of the deceased solely for the benefit of all the heirs⁸ or by all the heirs for their own benefit.⁹ Separate actions cannot be brought or maintained by both representatives and heirs.¹⁰ Under the statute of 1862 the action could be brought only by the executor or administrator.¹¹ The right of action being entirely statutory, the action can be prosecuted only by the persons therein designated.¹² By the Federal Employers' Liability Act the action may be prosecuted by the personal representative of the deceased employee for the benefit of the surviving widow and children of such employee.¹³

7. *Williams v. Southern Pac. Co.*, 36 Cal. App. Dec. 434, 202 Pac. 356.

8. See *infra*, § 28.

9. See *infra*, § 29. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *Lapique v. Agoure*, 170 Cal. 79, 148 Pac. 517; *Webster v. Norwegian M. Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276.

If the deceased, at the time of his death, is an infant, the action cannot be brought by heir but by parent or guardian. *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971. See *infra*, § 29.

10. *Hartigan v. Southern Pacific Co.*, 86 Cal. 142, 24 Pac. 851. See *infra*, § 43.

11. *Hartigan v. Southern Pacific Co.*, 86 Cal. 142, 24 Pac. 851. See

supra, § 15, and *infra*, § 28, as to action by administrator.

12. *Lapique v. Agoure*, 170 Cal. 79, 148 Pac. 517 (action by plaintiff who styled himself as surviving partner of firm of which deceased was a member, against the family of deceased for the wrongful death of such person); *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733 (but objection that there has not been a compliance with the statute as to joinder of parties must be seasonably raised or it will be waived in the absence of a sufficient excuse); *Kramer v. San Francisco, Market Street R. R. Co.*, 25 Cal. 434.

13. *Bowman v. Southern Pac. Co.*, 36 Cal. App. Dec. 1058, 204 Pac. 403.

Subrogation under Workmen's Compensation Act.—Section 26 of the Workmen's Compensation Laws provides that any employer having paid, or having become obligated to pay, compensation, may bring an action against a third person for the injury or death of an employee. Under a provision similar to this it has been held that the employer is entitled to be subrogated to the rights of the family of the deceased and may bring an action for the wrongful death of such person where the employer has paid a death benefit to the heirs.¹⁴

§ 28. Personal Representative.—An administrator or executor has the right to bring the action only because the statute authorizes him to do so; he is made simply a statutory trustee to recover damages for the benefit of the heirs.¹⁵ It necessarily follows that in the absence of heirs he has no right of action.¹⁶ The terms of section 1970 of the Civil Code limit the parties plaintiff to the personal representative of the deceased.¹⁷ Under an early statute stipulating that an action for wrongful death should be

14. *Western States Gas etc. Co. v. Bayside L. Co.*, 182 Cal. 140, 187 Pac. 735, discussing workmen's compensation law of 1913. The workmen's compensation law gives a right of recovery for death or injury of an employee to the widow and not to the children. It was therefore held that the making of a claim by the widow against the employer was sufficient to transfer to it the right of recovery established under Code Civ. Proc., § 377. See WORKMEN'S COMPENSATION.

15. *In re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97; *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Webster v. Norwegian M. Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Slaughter v. Goldberg*,

Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811.

See *supra*, § 24, as to beneficiaries, and *infra*, § 62, as to whether damages are part of estate.

16. *Kerrigan v. Market Street Ry. Co.*, 138 Cal. 506, 71 Pac. 621; *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Guidera v. Lapiana*, 35 Cal. App. Dec. 74, 199 Pac. 557; *Slaughter v. Goldberg*, *Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811.

See *infra*, § 36, as to necessity for alleging existence of heirs.

17. *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550.

brought by the "personal representatives" of the deceased it was decided that the term meant the administrator or executor and not the heir or next of kin. If there be any doubt as to the meaning of the term in section 1970 of the Civil Code it would seem that the early decision applies with equal force to the present statute in view of the fact that the words "personal representative" are followed immediately by the provision that the damages are recovered "for and on behalf, and for the benefit of the widow," etc., and the early statute had the similar words, "shall be for the exclusive benefit of the widow," etc.¹⁸

Under the general rule which permits a special administrator, when authorized by the order of court appointing him, to commence and maintain any suit or legal proceeding that might be commenced or maintained by a general administrator or executor,¹⁹ it has been held that, as the right to maintain an action to recover for a negligent death under either section 377 of the Code of Civil Procedure or section 1970 of the Civil Code is expressly conferred upon general personal representatives, a special administrator has the same right when authorized by the order appointing him.²⁰

Where suit is brought under the laws of a foreign state which gives the right to prosecute an action for wrongful death to the personal representative of the deceased alone, it is clear that such personal representative only can prosecute the action in California.¹ And where the federal

18. *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal. 434.

19. Code Civ. Proc., § 1415. See generally EXECUTORS AND ADMINISTRATORS.

20. *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330 (holding that general administrator may be substituted in suit brought by special administrator). See, also,

Cosgrave v. Pitman, 103 Cal. 268, 37 Pac. 232 (holding that marriage of an administratrix does not *ex instanti* deprive her of her power to act but is merely ground for her suspension and removal).

1. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862. See *infra*, § 31, as to jurisdiction. See CONFLICT OF LAWS, vol. 5, p. 483.

statute is applicable, the right to recover is in the personal representative and no one else can maintain the action.²

§ 29. Heirs.—The law of California is broader than that generally prevailing, and by section 377 of the Code of Civil Procedure the right to sue is conferred upon the heirs of the deceased.³ So far as they are concerned a single joint cause of action is given. The language of the statute has been said to permit of no other construction.⁴ Where the heirs are minors they should appear by their guardian ad litem.⁵ However, an infant plaintiff has a right to appear in court and his presence can raise no presumption that the jury will act through prejudice or passion in rendering its verdict.⁶ The surviving wife is an heir of the decedent and as such may bring suit under section 377.⁷ Section 376 of the Code of Civil Procedure

2. *Bowman v. Southern Pac. Co.*, 36 Cal. App. Dec. 1058, 204 Pac. 403, but holding that cause of action arose under the laws of California.

3. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862 (holding, however, that this right can be exercised only where cause of action has arisen within jurisdiction of state, and not where measure of right and form of procedure are those dictated by a foreign state); *Bowman v. Southern Pac. Co.*, 36 Cal. App. Dec. 1058, 204 Pac. 403 (holding that where the action is commenced by a representative and the heirs are substituted, such substitution cannot be in any sense regarded as the beginning of a new action). See *infra*, § 31, as to jurisdiction where action is brought under foreign statute.

4. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Valentine v. Hayes*, 37 Cal. App. 42, 173 Pac.

410 (holding that action was properly brought by widow and heirs under § 377 instead of by widow under § 1970). See *infra*, § 30, as to joinder.

5. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.

6. *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010. See *infra*, § 65, as to excessive damages. See INFANTS.

7. *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789. See Civ. Code, § 1386, subd. 5: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother nor sister, the whole estate goes to the surviving husband or wife."

But in such case as in others it must appear that the deceased was an adult, for the widow, as such, is given no right of action by the statute. *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971. See *infra*, § 36, as to requisites of

provides that "a father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child."⁸ No cause of action is vested in the mother if married except upon a showing that her husband has abandoned the family.⁹ The mother, having an interest in the subject of the action and in obtaining the relief demanded, may, however, be joined as a plaintiff in an action by the father.¹⁰ Facts when combined, such as the habitual intemperance of the husband, his cruel treatment of his wife and child, his lack of support since the granting of a divorce, etc., may be sufficient clearly to establish desertion and thus entitle the wife to bring suit for the death of her child.¹¹

§ 30. Joinder.—Although in some states an action for wrongful death may be maintained by one or more beneficiaries without joining all,¹² in California the statute does not authorize an action by a portion only of the heirs. Where the suit is by heirs, all of them should therefore join as plaintiffs,¹³ and if the consent of one who should be so joined cannot be obtained, he may be made a defendant.¹⁴

complaint in regard to existence of heirs.

8. *Delatour v. Mackay*, 139 Cal. 621, 73 Pac. 454; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35. See *supra*, § 14, as to difficulties likely to be encountered in application of statute.

9. *McLain v. Llewellyn Iron Works*, 37 Cal. App. Dec. 86, 204 Pac. 869.

10. *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35; *Code Civ. Proc.*, § 378.

11. *Delatour v. Mackay*, 139 Cal. 621, 73 Pac. 454.

12. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, stating that such statutes give the right of action to one for the benefit of all just as the California statute gives to the personal representative for the benefit of all the heirs.

13. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Good v. City of San Bernardino*, 33 Cal. App. Dec. 331, 193 Pac. 790; *Atchison, T. & S. F. Ry. Co. v. Phillips*, 176 Fed. 663, 100 C. C. A. 215.

14. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Atchison, T. & S. F. Ry. Co. v. Phillips*, 176 Fed. 663, 100 C. C. A. 215.

See *Code Civ. Proc.*, § 382, and see **PARTIES**. The requirement that all the heirs be joined does not neces-

It seems, therefore, that where all are not joined, and timely objection is made on that ground by defendant, the action should be abated, or, at least, the other heirs should be brought in. By a failure to make timely objection that all the heirs are not made parties the defendant may waive his right to have all of them made plaintiffs, in the absence of sufficient reason being given for his failure to object at an earlier stage.¹⁵ Where one heir brings the action and the remaining heirs join later, it has been held that the objection that there is a defect of parties plaintiff, cannot be sustained, since the situation is no different than would have existed if the other heirs had refused to join and had been made defendants.¹⁶

While there is no authority for a joinder of a plaintiff as an individual and also in his capacity as an executor where the right of action is in him or in the estate and not in both,¹⁷ it is clear that there is no misjoinder where a husband sues as an individual heir and also as guardian

sarily make all of them real parties in interest in the controversy. They may be indispensable, in that no right of action can be prosecuted without them, yet they may at the same time be merely nominal or formal parties. *Atchison, T. & S. F. Ry. Co. v. Phillips*, 176 Fed. 663, 100 C. C. A. 215, holding that where two heirs joined as defendants have no actual interest in the controversy, their citizenship cannot affect the jurisdiction of the federal court where it has been invoked on account of diversity of citizenship.

15. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, per Angellotti, J., stating that where no such showing is made the defendant is not prejudiced in the refusal of the court to sustain the objection, since the de-

fendant could not be subjected to a second recovery in a subsequent action by some other heir of whose existence he had no knowledge at the time of the action.

16. *Good v. City of San Bernardino*, 33 Cal. App. Dec. 331, 193 Pac. 790, holding that where the charter of a city requires verified claim to be made before action can be brought, the surviving heir does not lose right of action because some other heir has neglected or refused to join in the demand or is unknown at the time of filing of demand, but refusing recovery on ground that work upon which deceased was engaged was unauthorized.

17. See **EXECUTORS AND ADMINISTRATORS**.

ad litem of the minor heirs for the wrongful death of the wife and mother.¹⁸

Jurisdiction.

§ 31. **Administration of Foreign Statutes.**—An action for wrongful death is governed by the law of the jurisdiction where the tort is committed and, as the action is transitory, it may be maintained in any jurisdiction where the defendant is found.¹⁹ Since at common law there was no right of action for an injury causing death, and since the courts of one state do not take judicial notice of the laws of foreign states, it is necessary for a plaintiff suing in California for damages for death occurring in another state to plead and prove a law of that state permitting such action. Not only must the law of the foreign state be pleaded to show that in such forum there existed the right of action sued upon, but also it must be pleaded to show that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right of action is vested, and this because the court which renders the judgment can do so only by virtue of the foreign statute.²⁰ In considering the remedy created by the laws of a foreign jurisdiction the court will adopt the construction of the statute given to it by the courts of that jurisdiction, but if the statute has never been construed in the foreign state the court will construe it as it would a like statute of California.¹

Foreign statutes against public policy.—Although, as has been stated, the action for wrongful death can be

18. *Redfield v. Oakland C. S. Co.*, 153 Cal. 438, 95 Pac. 862, per Ry. Co., 110 Cal. 277, 42 Pac. 822, 1063. See *GUARDIAN AND WARD*. *McFarland, J.* See *CONFLICT OF LAWS*, vol. 5, pp. 427, 428.

19. *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 Pac. 1112; *Gregory v. Southern Pac. Co.*, 157 Fed. 113. 1. *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 Pac. 1112. See *CONFLICT OF LAWS*, vol. 5, p. 429.

20. *Ryan v. North Alaska Salmon*

maintained in any jurisdiction where the defendant is found, this rule does not obtain where the court of the state in which the suit is brought would, in enforcing the remedy, be acting in conflict with the express provisions or the general policy of the law of its own jurisdiction.² Thus a foreign law which allows an action to be brought by the personal representative of the decedent and stipulates that any damages recovered become assets of the estate to be administered like any other assets, the creditors and the expenses of administration to be paid therefrom if necessary, the balance going to the heirs, if any, or to go to the state by escheat, is in conflict with the policy of the law of California.³

§ 32. Death on High Seas.—No suit to recover damages for the death of a human being caused by negligence may be maintained in the admiralty courts of the United States under the general maritime law. Where, however, death is occasioned by a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given.⁴ It has, therefore, been held that when a death occurs through the wrongful or negligent act of another within the three-mile limit of the coast of California, an action lies under section 377 of the Code of Civil Procedure.⁵

2. See *CONFLICT OF LAWS*, vol. 5, p. 422.

3. *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 Pac. 1112. See *infra*, § 62.

4. *Western Fuel Co. v. Garcia* (U. S.), 66 L. Ed. 97, 42 Sup. Ct. Rep. 89, reversing *Western Fuel*

Co. v. Garcia, 255 Fed. 817, on ground that action was barred by statute of California. See *infra*, § 76, as to limitation of action in admiralty courts.

5. *In re Humboldt Lumber Mfrs. Assn.*, 60 Fed. 428.

Pleading.

§ 33. **By Plaintiff.**—Actions for wrongful death being purely statutory, it is necessary that the plaintiff allege facts sufficient to bring his case within the provisions of the particular statute under which the action may be maintained.⁶ Where the action is brought under section 377 of the Code of Civil Procedure, the complaint should state that the deceased was an adult at the time of his death, and that he left heirs.⁷ If the action is brought under section 376 it should be alleged that the deceased was a minor at the time of his death and that plaintiff is his father. Or, if the action is brought by the mother, it is necessary for her to allege, not only that deceased was a minor, but that the father is dead or has deserted his family.⁸ As has been seen, the persons entitled do not take as heirs or by succession, but as beneficiaries of the statute.⁹ For this reason it has been held that collateral kindred who may come technically within the meaning of the word "heirs," as used in section 377, can only recover by alleging and showing some special damage.¹⁰

6. *McLain v. Llewellyn Iron Works*, 37 Cal. App. Dec. 86, 204 Pac. 869 (holding that where the facts are such that the case comes apparently within the provisions of the Workmen's Compensation Act it must be alleged that deceased belonged to one of the classes excepted by that act, the action being brought under §§ 376 or 377 of the Code of Civil Procedure); *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971.

7. *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36. See *infra*, § 36, as to existence of heirs, and *infra*, § 38, as to amendment in absence of such allegation.

8. *McLain v. Llewellyn Iron Works*, 37 Cal. App. Dec. 86, 204 Pac. 869; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971, per Waste, P. J. See *supra*, § 14.

9. See *supra*, § 24, and *infra*, §§ 62 and 67.

10. *Simoneau v. Pacific Electric Ry.*, 159 Cal. 494, 115 Pac. 320; *Burk v. Arcata*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065. See *infra*, § 37, as to alleging pecuniary loss generally; *infra*, § 63, as to nominal damages; and *infra*, § 72, as to evidence of dependency.

The right of a plaintiff to sue as administrator sufficiently appears from an averment that he filed a petition for letters of administration and that thereafter such proceedings were had, that the court appointed him sole administrator and that he qualified as such and that letters of administration were issued to him.¹¹ Where a guardian is suing for minor heirs an objection that an averment as to the appointment and acceptance of appointment is not a due pleading of the appointing of a guardian ad litem, but that it is an averment of the conclusion of the pleader, has been overruled where the fact of the due appointment and acceptance by the appointee are shown without contradiction upon the trial.¹²

A slight variance between the allegations of the complaint and the proof in regard to the sex of one of the minor heirs is not of sufficient importance to warrant a reversal of a verdict and judgment for damages in favor of the plaintiffs.¹³

§ 34. By Defendant—Misjoinder.—If it appears upon the face of the complaint that there are heirs who are not joined, the defendant should demur. But if this does not appear upon the face of the complaint, and as a fact there are other heirs, their nonjoinder may be taken advantage of by answer. Where the question of a nonjoinder is not raised either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the

11. *Munro v. Pacific Coast Dredging, etc., Co.*, 34 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303. See *Guidera v. Lapiana*, 199 Pac. 757, holding that where complaint in its entirety can lead to no other view than that administrator is suing for benefit of heirs, it is not subject to objection that it is uncertain as to capacity of plaintiff.

12. *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas.

1918B, 408, 153 Pac. 712, where the pleading stated "that by an order of the court made on the 28th day of October, 1912, August Froeming was appointed their guardian ad litem and was by said order authorized to commence and prosecute this action in their behalf, and that he accepted said appointment."

13. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.¹⁴ Thus it has been held that it is no error for the court during the progress of the trial to refuse an amendment to the answer alleging on information and belief the existence of other heirs, so as to authorize the admission of evidence on that subject, when no showing is made in support of the application to amend, or as to why the objection has not been made earlier.¹⁵ Where misjoinder appears upon the face of the complaint, an objection to such misjoinder is waived by failure to specify it properly as a ground of demurrer and it cannot thereafter be urged.¹⁶ A motion that proceedings be stayed until other heirs are brought in is properly denied where there is no showing of the existence of any such heirs.¹⁷ A demurrer upon the general ground that the complaint does not state facts sufficient to constitute a cause of action is not sustainable if the complaint states a cause of action in favor of any one of several plaintiffs.¹⁸

§ 35. Negligence.—The rules concerning the necessity, manner and sufficiency of alleging the negligence of the defendant in actions for personal injuries generally apply with equal force in actions for wrongful death.¹⁹ It is therefore essential to a statement of a cause of action that

14. *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789, per Van Dyke, J. See Code Civ. Proc., § 434.

15. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733.

16. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269, holding that demurrer specifying generally a misjoinder of parties plaintiff and misjoinder of causes of action in the language of statute, without specifying wherein the alleged misjoinders consist, is insufficient.

17. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733.

18. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269, holding that a demurrer on the ground that plaintiffs have not legal capacity to sue is too broad and should be overruled, it appearing that one of them has capacity to sue. See PLEADING.

19. See NEGLIGENCE, for a full treatment of pleading in this connection.

negligence on the part of the defendant be alleged as in such other actions.²⁰ This negligence, it is settled in California, may be charged in general terms. But it must appear from the allegations that the negligence caused or contributed to the injury.¹ Where there is a single cause of action growing out of injuries negligently inflicted by defendant upon deceased, it is open to plaintiffs to charge this negligence in separate counts, as occurring in as many ways as they believed their evidence will show, and plaintiffs are entitled to recover if any one well-pleaded count is supported by sufficient evidence.² Where several distinct acts of negligence are alleged, proof of any one of which would entitle the pleader to a recovery, such pleading is not properly subject to demurrer for uncertainty or ambiguity because the plaintiff may recover upon proof of enough to make a cause of action.³ Where contributory negligence of deceased is not pleaded as a defense it is not a defense to the action.⁴

§ 36. Existence of Heirs.—It has been seen that an action for death is entirely statutory and that an administrator or executor has power to bring such action only as the statutory trustee for the heirs to recover damages which they have suffered.⁵ Consequently, where the complaint of an administrator or executor does not allege the existence of heirs it states no cause of action, for such an allegation is absolutely essential.⁶ While it is well di-

20. *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481, stating that the affirmative of such an issue is primarily upon the plaintiff.

1. See *supra*, § 21.

2. *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712. See NEGLIGENCE.

3. *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269, per *Melvin, J.* See NEGLIGENCE.

4. *Western States etc. Co. v. Bay-side L. Co.*, 182 Cal. 140, 187 Pac. 735. See *infra*, § 41.

5. See *supra*, § 28, and *infra*, § 62.

6. *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Kerrigan v. Market Street Ry. Co.*, 138 Cal. 506, 71 Pac. 621 (leaving undecided the point whether this objection can be waived where the question of the sufficiency of the complaint is not suggested until the

rectly to state in the complaint by the representative that the heirs named therein are all the heirs of the deceased, still a complaint is sufficient in that particular where it at least discloses the fact that there are heirs, naming them, without specifically stating whether those so named constitute all the heirs.⁷ A mere allegation that by reason of the death, "his heirs and personal representatives have suffered damages" in a specified sum has been held insufficient to show that the deceased left heirs.⁸ On the other hand, it has been held that where it is alleged that plaintiff left surviving him a widow and that suit is brought by the widow as administratrix, it is not necessary to allege that the suit was brought for the benefit of such widow, since it could not be otherwise brought.⁹ And in an action by a husband for the death of his wife the complaint need not expressly aver that the husband is the heir of the deceased where it is alleged that she was his wife at the time of her death.¹⁰ Similarly, where the action is by the wife for the death of her husband it is sufficient for the complaint to allege that the plaintiff is the "surviving wife and widow" and that at the time of his injury and death she was the wife of the deceased.¹¹

case has reached the reviewing court, and where the record shows that plaintiff, administratrix, is wife of decedent); *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Guidera v. Lapiana*, 35 Cal. App. Dec. 74, 199 Pac. 557; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Hirsch v. James S. Remick Co.*, 38 Cal. App. 764, 177 Pac. 876; *Boyle v. Coast Improvement Co.*, 27 Cal. App. 714, 151 Pac. 25; *Slaughter v. Goldberg*, *Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811.

7. *Guidera v. Lapiana*, 35 Cal. App. Dec. 74, 199 Pac. 557, per

Hart, J., stating that if it were necessary to name all the heirs a complaint averring that "the" heirs of V. G. are, etc., thus limiting the number by the article "the," could be so grammatically construed.

8. *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330.

9. *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47, action brought under § 1970, Civ. Code.

10. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503, action for death alleged to be due to malpractice of physician.

11. *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789.

Although there is no allegation that the deceased left heirs the defect may be cured by the introduction without objection of testimony as to the heirs.¹² Thus where the trial proceeds in all respects as though the pleadings sufficiently present the issue as to there being heirs and precisely as it would had the complaint contained the omitted allegation, such omission in the complaint is cured. And in such case a general demurrer is insufficient to apprise plaintiff of the defect and relieve the defendant from the necessity of objecting to the evidence.¹³

§ 37. Pecuniary Loss.—Although the complaint should contain an averment of pecuniary loss, by reason of the death alleged,¹⁴ it seems that it is not necessary to aver any special damages in order to constitute a good complaint.¹⁵ Under a general allegation of damage evidence can be given of the facts relating to, and allowance made for, loss of society, comfort, protection or services.¹⁶ Where the action is by the widow or one legally entitled to support from the deceased, it seems that even though there is no allegation that the heir suffered damage, such defect does not render the complaint obnoxious to a general demurrer where facts are alleged from which damages to the surviving heir must necessarily follow. The statute authorizes such damages as under the circumstances are just, and a person is deprived of such share in the earnings of the deceased as he is entitled to by law by reason

12. *Hirsch v. James S. Remick Co.*, 38 Cal. App. 764, 177 Pac. 876.

13. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90, where testimony was given as to relationship, that deceased had contributed to support of parents, etc. See *APPEAL AND ERROR*, vol. 2, p. 242.

14. *Ward v. Southern Pac. Co.*, 42 Cal. App. 182, 183 Pac. 594.

15. *Bond v. United Railroads*, 159

Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603.

16. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Young v. Fresno etc. Irr. Co.*, 24 Cal. App. 286, 141 Pac. 29. See *infra*, § 74.

of his relationship.¹⁷ As to what constitutes sufficient pleading of pecuniary loss it has been held that an allegation that the plaintiff has been damaged through the negligence of the defendant and by the death of the deceased in a certain amount is equivalent to an averment that plaintiff has suffered loss in the sum alleged.¹⁸ So, where the prayer is for a specific sum, it has been held that this is equivalent to a formal allegation of the amount of damages sustained.¹⁹ And where, in an action by a husband for the death of his wife, the only damage alleged is that to the husband resulting from the death, and the complaint cannot be upheld as an action for damages caused either to the husband or wife during her lifetime, such complaint is not subject to the objection that it is uncertain in that it states two causes of action, one for damages for the death and one an action for damages to the wife during her lifetime.²⁰ Where a complaint in an action to recover for the death of the plaintiff's minor child, avers that by such death plaintiff has been deprived of the society and companionship of his child to his damage in a certain sum, and of his services and earnings of a certain value, the trial court need not require plaintiff to elect upon which of these separate averments he will rely. They are not properly the subject of separate averments, being but elements in estimating the value of services.¹

17. *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47, action brought under § 1970, Civ. Code, stating that an allegation that the plaintiff has suffered damage as administratrix should be disregarded as surplusage. See *infra*, § 56, as to legal right to support, as justifying substantial damages, and *infra*, § 72, as to evidence of dependency of beneficiaries.

18. *Ward v. Southern Pac. Co.*, 42 Cal. App. 182, 183 Pac. 594, stating that a denial in the answer

that plaintiff suffered any damage by the death, and the introduction of evidence upon the theory that the fact was properly in issue caused the error, if any, to be absolutely without prejudice.

19. *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47.

20. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503.

1. *Fox v. Oakland Consol. St. Ry. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25, stating that the ob-

Under the Federal Employers' Liability Act there can be no recovery where it is not alleged or proven that the plaintiff was in any way dependent upon the decedent or had a reasonable expectation of pecuniary benefit as a result of his continuation of life.³

§ 38. Amendments Generally.—The complaint may be amended as in other actions³ where the amended pleading does not state a new cause of action, and the amendment, although made after the expiration of the period of limitations, will relate back to the commencement of the suit.⁴ Thus where the complaint is filed in time but does not show that the deceased left heirs or relatives for whose benefit the action is authorized, it is erroneous for the trial court to refuse to permit an amendment to cure the defect, on the ground that plaintiff is stating a new and barred cause of action.⁵ Similarly, where the action is brought under section 377 of the Code of Civil Procedure it is erroneous to refuse an amendment of the complaint to show that the deceased was an adult at the time of his death.⁶ In case the evidence at the trial clearly shows that the deceased was an adult, but the complaint fails to

jection to the manner of pleading is not to be reached by such motion, though it might perhaps be reached by a demurrer for uncertainty or ambiguity. See *infra*, § 51, as to nature of loss.

2. *Williams v. Southern Pac. Co.*, 36 Cal. App. Dec. 434, 202 Pac. 356.

3. See PLEADING.

4. *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47. See *Bowman v. Southern Pac. Co.*, 36 Cal. App. Dec. 1058, 204 Pac. 403, holding that the substitution

of the beneficiaries as parties instead of the representative where the action is under § 377, Code Civ. Proc., is in no sense the beginning of a new action.

5. *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Bar v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47 (amendment adding allegation that deceased left a widow). See *infra*, § 39, as to amendment bringing cause of action under another statute.

6. *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971.

state that fact, the complaint may be amended in the lower court after appeal, on retrial.⁷ And where an action is brought under the laws of another jurisdiction and is disposed of on an erroneous ruling on the question of jurisdiction alone, it has been held that the plaintiff should be allowed to amend to supply an allegation necessary, under the laws of the foreign jurisdiction, if possible.⁸

§ 39. Amendment Bringing Cause of Action Under Another Statute.—Where the complaint is by a husband and wife for damages for bodily pain and injury negligently caused, and, after the death of the wife, an amended complaint is filed stating a cause of action by the husband alone for damages for the death of the wife, the filing of the same is in effect a discontinuance of the former action and the beginning of a new action for a new cause. The proper course for the defendant to follow in such a case, if he does not wish to consent to the mode of proceeding, is to move to strike the new complaint from the files on the ground that it is not an amended or supplemental complaint but one stating a new and different cause of action. But where no such motion is made and, on the contrary, the defendant appears to the new cause of action and demurs to the new complaint, he waives process thereon and the court has jurisdiction of the parties and subject matter and the defendant cannot raise the objection for the first time on appeal. In such case the original complaint is not before the court and the sufficiency of the amended complaint upon demurrer as to the right of the plaintiff to maintain the cause of action therein stated is to be determined solely by its own allegations without reference to those in the original complaint.⁹

7. *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36.

was not pleaded in original complaint.

8. *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 Pac. 1112, where parents' dependency

9. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503, per Shaw, J.

Where an action is commenced under section 377 of the Code of Civil Procedure by heirs to recover damages of an employer, it is not error for the court to allow the filing of an amended complaint substituting the administrator as sole plaintiff, upon the objection of the defendant that the action should have been brought under section 1970 of the Civil Code.¹⁰ The court in this case stated that it should be borne in mind that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues, while the same persons still remain the beneficiaries of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action against which the statute of limitations may be pleaded, though it has run in the meantime. And the action is not barred by the statute of limitations because of such amendment.¹¹

Defenses.

§ 40. In General—Death of Child.—Where death is caused by an injury voluntarily inflicted and justification is set up, the burden is on the defendant to prove the defense, since there is no legal presumption that a bodily injury voluntarily inflicted is justifiable.¹² And where

10. *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550, where wife as administratrix was substituted as party plaintiff instead of the wife and father as heirs of deceased.

11. *Reardon v. Balaklala Consol. Copper Co.*, 193 Fed. 189; *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550; *Cox v. San Joaquin Light etc. Co.*, 33 Cal. App. 522, 166 Pac. 578.

12. *Brooks v. Haslam*, 65 Cal. 421, 4 Pac. 399 (stating that a denial of an allegation of the complaint that the defendant did the shooting willfully, unlawfully and maliciously, raises no issue, because the shooting, if not justifiable or excusable, was willful, unlawful and malicious); *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243. See *ASSAULT AND BATTERY*, vol. 3, p. 187.

the negligence of a parent contributes proximately to an injury resulting in a child's death, such negligence will prevent recovery by the parent for the death of the child.¹³ Thus a father who allows his four-year old son to use a tri-cycle on a city sidewalk in violation of an ordinance, is himself guilty of a violation of the ordinance under section 31 of the Penal Code (defining principals), and where such negligence proximately causes the death of the child the father cannot recover therefor.¹⁴ If the question as to whether the parent has used ordinary care in protecting the child is a fairly debatable one under all the circumstances, then such question becomes one for the jury. However, evidence that the plaintiff had no servants to care for his child and was too poor to employ any, has no relevant bearing upon the question whether he gave the child that degree of care which the law requires, and therefore it is erroneous to instruct the jury that the fact that plaintiff is a poor man, if true, is a matter to be considered in determining whether or not he has been guilty of contributory negligence.¹⁵

§ 41. Contributory Negligence.—As a general rule, there can be no recovery by heirs for wrongful death where the deceased was guilty of contributory negligence which was the proximate cause of the death,¹⁶ unless the act of the

13. *Muller v. Standard Oil Co.*, 180 Cal. 260, 180 Pac. 605; *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

14. *Muller v. Standard Oil Co.*, 180 Cal. 260, 180 Pac. 605, as to death of child run over by truck emerging from alley.

15. *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25, per Van Fleet, J. See PARENT AND CHILD.

16. *Read v. Pacific Electric Ry. Co.*, 185 Cal. 520, 197 Pac. 791 (stating that unless the doctrine of last

clear chance applied the plaintiff could not recover); *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36 (where deceased was clearly guilty of contributory negligence as a matter of law, that question should not be submitted to the jury); *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183 (not deciding whether contributory negligence was present); *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 Pac. 714 (holding that where there are no witnesses the presumption is that deceased took

defendant was willfully and wantonly done.¹⁷ In an action by a father for the death of his minor child in which action the mother is not joined, the contributory negligence of the mother is a defense, not because of her interest in the community property, but because in caring for the child she represents and acts for the community and for the husband as the head of the community, and her negligence in caring for the child is the negligence of the husband.¹⁸ In regard to whether the deceased was negligent so as to prevent recovery for his death the usual rules in regard to injury by negligence apply. Thus the age and experience of the deceased may be taken into consideration.¹⁹ Likewise, the principle is well recog-

due care for his own safety, and if there is no evidence tending to rebut this presumption, instructions on the subject of contributory negligence are properly refused); *Shade v. Bay Counties Power Co.*, 152 Cal. 10, 92 Pac. 62; *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926 (where deceased did not exercise ordinary care the question of contributory negligence is one of law); *Lemasters v. Southern Pacific Co.*, 131 Cal. 105, 63 Pac. 128 (riding upon board attached to switch engine in violation of rules of company); *Studer v. Southern Pacific Co.*, 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942 (where child of twelve attempted to cross between the cars of a freight train standing at a crossing); *Pepper v. Southern Pacific Co.*, 105 Cal. 399, 38 Pac. 974; *Dunne v. Hines*, 33 Cal. App. Dec. 785, 195 Pac. 276 (presumption is that decedent was exercising due and proper care for his own safety where there were no eye-witnesses to the accident); *Gay v. Winter*, 34 Cal. 153; *Valentine v. Hayes*, 37 Cal. App. 42, 173 Pac.

410 (holding that where the facts show that the accident was caused solely by the negligence of deceased such facts justify the court in granting a new trial, whether the granting is based on that reason or not); *Noyes v. Southern Pac. R. Co.*, 3 Cal. Unrep. 293, 24 Pac. 927.

17. *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 63 L. R. A. 238, 74 Pac. 15.

Under certain circumstances contributory negligence may not prevent recovery, such as in cases where the doctrine of last clear chance is applicable. *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Cal. 36. See NEGLIGENCE, as to effect of contributory negligence, generally.

18. *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35.

19. *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564.

The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same de-

nized that where a person under the stress of sudden peril caused by the fault of the defendant runs directly into the very danger which he fears, he is not at fault.²⁰ Defenses peculiar to the law of master and servant, such as the rule which prevented recovery where a servant accepts risks incident to employment, and the defenses which may be set up to prevent recovery under the Workmen's Compensation Act, are treated in specific articles in this work.¹

§ 42. Settlement or Release.—Statutes giving a right of action for wrongful death are in some states but statutes of survivorship. They carry over to some living person after the death of the injured person precisely the right of action and recovery which the injured person would have had if his injuries had not resulted fatally.² Manifestly under such a statute a release of the wrongdoer by the person injured deprives the living person, who may have been empowered by the statute to commence or carry on the action, of all right of recovery. But such is not the California statute. It creates a new right of action with a different measure of damage from that which accrued to the injured person.³ It has therefore been held

gree of care that would be expected from children of his age, or which children of his age ordinarily exercise. Children, as well as adults should use the prudence and discretion which persons of their years ordinarily have. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity; *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991, per Henshaw, J. See NEGLIGENCE.

20. *Randolph v. Hunt*, 41 Cal. App. 739, 183 Pac. 358.

1. See MASTER AND SERVANT; WORKMEN'S COMPENSATION.

2. See *supra*, § 19.

3. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513, per Henshaw, J.; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; *Marks v. Reisinger*, 35 Cal. App. 44, 169 Pac. 243. See 8 Ruling Case Law, p. 786, stating that in those states which have followed Lord Campbell's Act there is but one cause of action under the law for which there can be but one compensation, and citing California decisions as

that where a person injured executes to the wrongdoer a full release from all claims and causes of action for such injuries, and subsequently dies as the result of the same injuries, such release is not a bar or defense to, and does not affect the right of, action given by section 377 of the Code of Civil Procedure to the heirs or personal representative.⁴ For a similar reason it has been held that declarations of the deceased to the effect that he was not struck or injured by the defendant are inadmissible and objections to evidence of such declarations as hearsay are properly sustained.⁵

The validity and effect of agreements releasing a common carrier from liability for injuries due to its negligence are treated elsewhere in this work.⁶ It may be noted here, however, that such a contract cannot release a carrier from liability in damages for the death of a gratuitous passenger when such death was caused by the gross negligence of the carrier.⁷

§ 43. Another Action Brought or Pending.—But one action for wrongful death is permitted and that action may be brought either by the heirs of the deceased or by his personal representatives. When an action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits. Accordingly, when

establishing an exception to this general rule.

4. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513, stating that the California statute must be construed from its own peculiar language. See note 18 A. L. R. 678, as to compensation from other source as precluding or reducing recovery.

5. The whole theory upon which such declarations are excluded in a case of this character is that the legal rights of the heirs or representatives of a deceased person

seeking to recover for his death resulting from the wrongful act of another, while growing out of the injury causing the death, are independent of the fact and cannot be defeated or affected by anything the deceased said or did. *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243, per Hart, J. (death caused by assault).

6. See *CARRIERS*, vol. IV, pp. 920, 921.

7. *Walther v. Southern Pacific Co.*, 159 Cal. 769, 37 L. R. A. (N. S.) 235, 116 Pac. 51.

the personal representative has brought an action, if another action is afterward brought by the heirs, the pendency of the prior action may be pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be pleaded in bar of the second action.⁸ Similarly, a recovery had by some of the heirs is a bar to a further recovery in a subsequent action by some other heir or heirs of whose existence the defendant had no knowledge at the time of the first action.⁹ So a judgment in favor of a widow for the death of her husband, she being the only heir then capable of maintaining an action therefor, exhausts the right given by the statute and precludes a subsequent action for the same death by a posthumous child whose existence in its mother's womb was unknown to the defendant at the time of the previous action, trial and judgment.¹⁰

Under the rule that the liability of tort-feasors for the same tort is joint and several and that no bar arises by the mere rendition of several judgments or until satisfaction in some form is received or what in law is deemed equivalent, it has been held that, in an action for death caused by an injury received by reason of the wrongful act of several defendants, the fact that some of them avail themselves in the United States district court of the limited liability under the federal statutes and the fact that the plaintiff appears therein to claim damages, does not preclude his right to proceed in the superior court

8. *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320; *Daubert v. Western Meat Co.*, 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244; *Hartigan v. Southern Pacific Co.*, 86 Cal. 142, 24 Pac. 351 (holding that an executor has authority with the approval of the court to compromise an action for wrongful death, and that such compromise will defeat a subsequent action by the heirs);

Munro v. Dredging etc. Co., 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303. See *ABATEMENT AND REVIVAL*, vol. 1, p. 23 et seq.

9. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Daubert v. Western Meat Co.*, 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244.

10. *Daubert v. Western Meat Co.*, 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244.

against the other defendants while the proceeding is pending in the federal court.¹¹

Evidence.

§ 44. Admissibility in General.—In actions for wrongful death the general rules as to the admissibility of evidence apply.¹² Therefore questions as to what is admissible as part of the *res gestae*,¹³ as to the admissibility of the declarations and admissions of deceased,¹⁴ his statements as to the cause of the accident,¹⁵ and in regard to his sufferings,¹⁶ and as to privileged communications of physicians,¹⁷ are governed by general rules which are fully discussed elsewhere.¹⁸ Evidence of the position of deceased at the time he received the fatal injury is admissi-

11. *Grundel v. Union Iron Works*, 127 Cal. 438, 78 Am. St. Rep. 75, 47 L. R. A. 467, 59 Pac. 826, holding that it was error for the superior court to dismiss the action as to the other defendants because of such federal proceeding, the plaintiff not having received satisfaction or the equivalent thereof in any amount.

See, generally, *TORTS*.

12. *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712; *Diller v. Northern California Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359. See *EVIDENCE*.

13. *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712 (ex post facto evidence forming no part of the *res gestae* and being usually self-serving is not admissible); *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106 (declarations of deceased after accident); *Henkle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac.

56 (as to statements of injured person while still under wheel of car which injured him so that he later died); *Moreno v. New Guadalupe Mining Co.*, 35 Cal. App. 744, 170 Pac. 1088; *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 523.

14. *Hedge v. Williams*, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106; *Moreno v. New Guadalupe Mining Co.*, 35 Cal. App. 744, 170 Pac. 1088.

15. *Moreno v. New Guadalupe Mining Co.*, 35 Cal. App. 744, 170 Pac. 1088.

16. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Evarts v. Santa Barbara, etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830.

17. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Moreno v. New Guadalupe Mining Co.*, 35 Cal. App. 744, 170 Pac. 1088. See *PHYSICIANS AND SURGEONS; WITNESSES*.

18. See *EVIDENCE*.

ble even though such evidence is given in an answer which is not relevant to the question asked.¹⁹ Photographs of the scene of the accident,²⁰ maps for the purpose of locating the premises and as diagram of the scene of the accident,¹ broken parts of machinery alleged to have caused the injury,² and evidence of persons who examined the premises after the accident where the testimony shows the place remained unchanged,³ have been held to be admissible as in other civil cases.⁴ Experiments have also been made in the presence of the jury.⁵

§ 45. Cause of Death.—By section 15 of the act of March 18th, 1905, as amended in 1907,⁶ a copy of the record of death made under the act, when properly certified is prima facie evidence as to the facts stated therein. Where, however, the statements in the certificate are founded on hearsay they are not entitled to a very high degree of credence and the jury may be justified in finding

19. *Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. 970.

20. *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359, enlargements may also be introduced, and it is for the trial court to determine from the evidence before it whether such enlargement is a correct reproduction.

1. *Foley v. Northern California P. Co.*, 165 Cal. 103, 130 Pac. 1183.

2. *Leahy v. Southern Pac. R. R. Co.*, 65 Cal. 150, 3 Pac. 622.

3. *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269, where question involved was condition of wiring of premises, the deceased having been claimed to have been killed by a shock of electricity.

4. See EVIDENCE.

5. *Leahy v. Southern Pac. R. R. Co.*, 65 Cal. 150, 3 Pac. 622.

See, also, *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733 (as to admissibility of testimony on cross-examination that defendant had made no inquiry as to identity or welfare of injured person); *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 704, 87 Pac. 376 (holding inadmissible evidence as to knowledge of deceased of danger, where witness had no means of knowing the knowledge of deceased); *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139 (holding it error to allow plaintiff to prove that deceased intended to sue the defendant); and *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269 (as to placing in evidence certificate of appointment of a guardian ad litem for infant plaintiffs).

See generally EVIDENCE.

6. Stats. 1905, p. 115; Stats. 1907, pp. 296, 300.

from the evidence that death resulted from another cause.⁷ But refusal to admit in evidence such certified copy of a death certificate has been held not to be prejudicial where the physician who made out the certificate is a witness at the trial and testifies as to the cause of death.⁸ The record of a conviction of murder has been held to be admissible as evidence of the fact that the person convicted was implicated in the murder of deceased.⁹ Testimony showing or tending to show an attempt on the part of a party to cover up, conceal or otherwise prevent pertinent facts from being presented is competent and proper as to the cause of death.¹⁰ Rules governing the introduction of opinion evidence as to the cause of death are the same as in civil cases generally. Thus a physician who has made an examination of the dead body may not only give his opinion upon the cause of death but may also state his views regarding the instrumentality by which the fatal force was probably applied.¹¹ However, it has been held that any error in refusing to admit such testimony is cured if the subsequent testimony of the witness substan-

7. *Robinson v. Western States Gas & Electric Co.*, 184 Cal. 401, 194 Pac. 39. See *Rowe v. Such*, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760, holding that although the verdict of a coroner's jury is prima facie evidence of the cause of death, it is not proper to admit it to prove the negligence of the defendant when, upon that question, the opinion of the jury was but hearsay, since it could not bind the defendant who was not a party to it.

See note, 6 A. L. R. 548, as to coroner's verdict as evidence, and note, 17 A. L. R. 359, as to death certificate as evidence.

8. *Longuy v. La Société Française de Bienfaisance Mutuelle*, 35 Cal. App. 9, 198 Pac. 1011.

9. *Harris v. More*, 2 Cal. Unrep. 421, 5 Pac. 159.

10. *Ross v. San Francisco-Oakland Terminal Rys. Co.*, 32 Cal. App. Dec. 415, 191 Pac. 703, such efforts may be shown, not as part of the res gestae, but in the nature of an admission the effect of which is a matter for the consideration of the jury.

11. *Foley v. Northern California P. Co.*, 165 Cal. 103, 130 Pac. 1183. See *Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. 970, holding that the admission of such testimony does not create prejudicial error even though the cause of death is admitted by the defendant to be due to the injury. See EVIDENCE.

tially covers the matter upon which his opinion is asked.¹² Where one of the vitally important issues is whether deceased died as a result of the wrongful act of the defendant or from a disease from which she was suffering, it is error not to permit nurses, who were familiar with the condition of the deceased, to testify whether in their opinion she would have died from disease at or about the time she did die if it had not been for the wrongful act of the defendant.¹³ Conclusions of witnesses are inadmissible in accordance with the general prohibitions, but it has been held that in an action for death by shooting, the testimony of the widow of the deceased that she saw the defendant "shoot and kill" her husband is not open to the objection that it involves a conclusion where the statement is followed by testimony showing in what manner defendant shot and killed.¹⁴ Where in the light of facts introduced in evidence a reasonable conclusion may be drawn by the jury as to the cause of death the reviewing court will not set aside such finding.¹⁵

§ 46. Presumptions and Burden of Proof.—The burden of proof is upon the plaintiff throughout to show, upon the entire evidence and by a preponderance thereof, the fact that death was caused by the wrongful act or negligence of defendant.¹⁶ Where negligence is alleged the

12. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733.

13. *Longuy v. La Société Française de Bienfaisance Mutuelle*, 35 Cal. App. Dec. 9, 198 Pac. 1011, also holding that where it was contended that death was caused by use of inhalators in which eucalyptus oil was vaporized, it was error to permit testimony of two witnesses as to type of inhalators used in other institutions where neither was in use by defendant or in common use in the community.

14. *Guidera v. Lapiana*, 35 Cal. App. Dec. 74, 199 Pac. 557.

15. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733. See *infra*, § 47, as to weight and sufficiency of evidence as to cause of death.

16. *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481; *Albert v. McKay & Co.*, 35 Cal. App. Dec. 505, 200 Pac. 83, holding that plaintiff must establish theory of death resting on circumstantial evidence by preponderance of evidence. See, also, *Galloway v. United Railroads*, 34 Cal. App. Dec. 645, 197 Pac. 663.

defendant has only to make such a showing of the exercise of care as to leave the evidence upon the issue of negligence in such condition that the jury cannot conclude that negligence has been satisfactorily established by a preponderance of the evidence.¹⁷ But plaintiff is not bound to show that defendant was guilty of negligence without any contributory negligence on his own part.¹⁸ In California the burden of proving contributory negligence is cast upon the defendant.¹⁹ And the right of defendant to have a jury instructed to return a verdict in its favor upon the ground that the evidence shows that the deceased was guilty of contributory negligence can obtain only where the evidence conclusively establishes such negligence.²⁰ In cases where negligence of the defendant is affirmatively shown and there is no proof of the conduct of the deceased, the jury are at liberty to infer ordinary care on his part, taking into consideration his character and habits as proved and the natural in-

17. *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481, per Angellotti, J., discussing fully the term "burden of proof." See NEGLIGENCE.

18. *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 Pac. 56 (holding that it is erroneous to instruct the jury that plaintiff must prove by a preponderance of evidence that deceased was free from contributory negligence); *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal. 320.

19. *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712 (holding such an instruction to be correct); *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991; *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 66 Pac. 734 (action for death caused by collision with street-car); *Munro v. Pacific Coast Dredging etc. Co.*,

84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303 (where there is no evidence of contributory negligence in the cause the doctrine of such negligence is properly ignored in the instructions); *Randolph v. Hunt*, 41 Cal. App. 739, 183 Pac. 358; *Foley v. Northern California Power Co.*, 14 Cal. App. 401, 112 Pac. 467 (where deceased was killed by picking up live wire); *Faylor v. Great Eastern Quicksilver Mining Co.*, 45 Cal. App. 194, 187 Pac. 101 (holding that it was negligent for defendant to leave an open, unguarded stope in an abandoned tunnel of a mine, around which children often played). See NEGLIGENCE.

20. *Johnson v. Southern Pacific Co.*, 154 Cal. 285, 97 Pac. 520. See NEGLIGENCE.

instincts of self-preservation.¹ There are cases where the state of the evidence is such that the court may declare as a matter of law that there was no negligence on the part of defendant or that plaintiff has been guilty of contributory negligence.² But when the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact.³

§ 47. Weight and Sufficiency Generally.—Generally speaking, the weight and sufficiency of the evidence in an action for wrongful death and the inferences to be drawn from it are questions exclusively for the jury, and their verdict will not be interfered with unless the reviewing court can say that it is unwarranted.⁴ Thus where there

1. *Gay v. Winter*, 34 Cal. 153; *Green v. Southern Pac. Co.*, 35 Cal. App. Dec. 400, 199 Pac. 1059; *Ross v. San Francisco-Oakland Terminal Rys. Co.*, 32 Cal. App. Dec. 415, 191 Pac. 703. But see *Ham v. Los Angeles County*, 31 Cal. App. Dec. 496, 808, 59 Cal. Dec. 474, 189 Pac. 462, holding that where statute requires that plaintiff must show due care in order to hold municipality, it is erroneous for court to instruct the jury that the law raises a presumption of due care in such cases.

2. *Davies v. Oceanic Steamship Co.*, 89 Cal. 280, 26 Pac. 827; *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal. 320. See NEGLIGENCE, for full treatment of this subject in actions generally.

3. *Davies v. Oceanic Steamship Co.*, 89 Cal. 280, 26 Pac. 827, per De Haven, J. (where it was claimed that deceased was negligently precipitated down a hatchway); *Nehrbas v. Central Pacific R. R. Co.*, 62

Cal. 320 (holding that question of contributory negligence of children approaching a train on a highway was properly submitted to jury); *Randolph v. Hunt*, 41 Cal. App. 739, 183 Pac. 358. See, also, *infra*, § 47, as to weight and sufficiency of evidence.

As in other civil cases where a party is charged with crime, the presumption of innocence obtains in actions for wrongful death as in criminal cases, and the evidence should be sufficient to overcome such presumption; *Guidera v. Lapiana*, 35 Cal. App. Dec. 289, 199 Pac. 557, stating that the rule generally is sound but its particular application is for the trial court and not on appeal.

4. *Robinson v. Western States Gas & Electric Co.*, 184 Cal. 401, 194 Pac. 39; *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (as to death of child caused by being run over by automobile); *Froeming v. Stockton*

are two theories as to the cause of death and the evidence warrants the jury in finding in favor of either, the question is solely for the jury since both are reasonable deductions from the circumstances.⁵ As in other actions for personal injuries the jury is the exclusive judge of the facts and can disbelieve the testimony of any witness, and if substantial evidence supports the verdict where the evidence is conflicting the verdict of the jury must stand.⁶ Direct testimony as to the cause of death may be contradicted by circumstantial evidence, and the contradiction may be so strong that it will justify a disbelief of the tes-

Electric R. R. Co., 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712; Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163; Leahy v. Southern Pac. R. R. Co., 65 Cal. 150, 3 Pac. 622; McKeever v. Market Street R. R. Co., 59 Cal. 294; Meier v. Golden State Auto Tour Corp., 33 Cal. App. Dec. 735, 195 Pac. 290 (as to question whether passenger on stage had paid fare); Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (where question was whether assault was in self-defense); Foley v. Northern California Power Co., 14 Cal. App. 401, 112 Pac. 467 (where deceased was killed by picking up live wire); De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 Pac. 397; Williams v. San Francisco etc. Ry. Co., 6 Cal. App. 715, 93 Pac. 122.

5. Parsons v. Easton, 184 Cal. 764, 195 Pac. 419 (as to cause of death in elevator); Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733; Dyas v. Southern Pacific Co., 140 Cal. 296, 73 Pac. 972; Alameda County v. Tieslau, 44 Cal. App. 332, 186 Pac. 398. See George L. Eastman Co. v. Industrial Acc. Com., 186 Cal. 587, 200 Pac. 17, applying

the same rule to review of finding of industrial accident commission. Where there are opposing theories as to the cause of death, such as in the case where the amount of current of electricity which passed through a body is in issue, it is competent for a witness to testify as to whether he has received a shock equal to what is contended by one party was the amount which passed through the body of deceased, the testimony being that the deceased had been in good physical condition prior to such shock. The competency of such testimony regards the result that such shock would have on a normal man. Bergin v. Tulare County Power Co., 173 Cal. 709, 161 Pac. 269.

6. Young v. Southern Pacific Co., 182 Cal. 369, 190 Pac. 36, per Wilbur, J., stating the rule generally; Bowdoin v. Southern Pacific Co., 178 Cal. 634, 174 Pac. 664 (holding that the credibility of a witness is exclusively for the jury, and a verdict based upon sufficient testimony cannot be overturned by a reviewing court); Fox v. Oakland Con. St. Ry., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

timony.⁷ Where the facts are undisputed and the dictates of common prudence point to only one reasonable conclusion, the question is then one of law for the court and a verdict may be either directed or a nonsuit granted.⁸

Instructions and Verdict.

§ 48. **Instructions.**—In reviewing instructions to the jury in actions of this kind, as in actions generally, it is not the proper test to take into consideration a single instruction or excerpts from a particular charge. All the instructions given must be considered and if, taken as a whole, they lay down a correct rule, that is all that is required.⁹ Accordingly, a judgment will not be reversed merely because any one instruction does not state the whole law with all of its modifications.¹⁰ However, it is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the liability of the defendant and to warrant the conclusion that plaintiff is entitled to a verdict.¹¹ Instructions which not only misstate the law but direct a verdict for the plaintiff upon the finding by the jury of the various facts specified therein, without embracing all the things necessary to show liability and to warrant the direction or conclusion that the plaintiff is entitled to a verdict, are erroneous.¹²

7. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419, as to death occurring in elevator, where only eye-witness was operator. See EVIDENCE.

8. *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 Pac. 29. See EVIDENCE.

9. *Peters v. Southern Pacific Co.*, 160 Cal. 49, 116 Pac. 400; *Benussi v. Hannah*, 35 Cal. App. Dec. 449, 199 Pac. 1063; *Green v. Southern Pac. Co.*, 35 Cal. App. Dec. 400, 199

Pac. 1059; *De Witt v. Floriston Pulp & Paper Co.*, 7 Cal. App. 774, 96 Pac. 397. See APPEAL AND ERROR, vol. 2, p. 1027; TRIAL.

10. *De Witt v. Floriston Pulp & Paper Co.*, 7 Cal. App. 774, 96 Pac. 397.

11. *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700.

12. *Dunne v. Hines*, 33 Cal. App. Dec. 785, 195 Pac. 276; but see *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808, holding

An evident mistake which is a mere inadvertence that could not have misled the jury will not, as in other cases, warrant a new trial.¹³ Criticism on appeal of the instructions because they unduly emphasized the matter of damages and might have led the jurors to believe that plaintiff was entitled to compensation has no substantial merit where no objection to the substance of such instructions is made.¹⁴

§ 49. Verdict.—In an action by heirs under section 377, the law does not authorize a verdict for separate damages to each plaintiff. The statute contemplates a single recovery for the benefit of the family of the deceased or those of his heirs who are dependent upon him for support. The verdict should therefore be given for a lump sum to all the plaintiffs, including, of course, the damages to each of them.¹⁵ Where a verdict is returned against all the defendants against whom suit is brought the evidence should justify the conclusion that death was due to the negligent or wrongful act of each.¹⁶ And where an action is tried and submitted to the jury upon all the issues tendered by three counts in the complaint, a verdict sustainable on either or both of the first and third counts will not be reversed because of failure of proof to sustain the second count.¹⁷

that where an instruction does not contain a misdirection to the jury, but rather an incomplete direction, the appellant is in no position to complain if he does not ask for a more specific and explicit instruction.

13. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269, where instruction used the word "plaintiff" instead of the word "decedent."

14. *Bergen v. Tulare County Power Co.*, 178 Cal. 709, 161 Pac.

269, action for death of man killed by shock of electricity.

15. *Robinson v. Western States Gas & Electric Co.*, 184 Cal. 401, 194 Pac. 39, per Shaw, J., but stating that no injury is suffered by defendant on account of separate damages being awarded, if damages are not excessive. See *infra*, § 67.

16. *Young v. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36.

17. *Young v. Fresno etc. Irr. Co.*, 24 Cal. App. 286, 141 Pac. 29.

Damages.

§ 50. **In General.**—In some of the states the amount of damages which can be recovered for wrongful death is limited by law,¹⁸ but in California there is no statutory restriction or direction except the general provision that “such damages may be given as under all the circumstances may be just.”¹⁹ This rule for computing damages, which is contained in section 377 of the Code of Civil Procedure, is expressly made applicable to actions brought under section 376 for the wrongful death of a minor.²⁰ Inasmuch as statutes of other states limiting the amount recoverable were enacted long before section 377 of the Code of Civil Procedure, this provision of the code is said to be a direct determination of the legislature that the policy adopted by other states in that regard shall not exist in California.¹ The statutory rule is the only

18. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *In re Humboldt Lumber Mfrs. Assn.*, 60 Fed. 428.

19. Code Civ. Proc., § 377; *Weizorek v. Ferris*, 176 Cal. 353, 167 Pac. 234; *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Wolford v. Lyon Gravel G. M.*

Co., 63 Cal. 483; *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604; *McKeever v. Market Street R. R. Co.*, 59 Cal. 294; *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20; *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361; *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010; *The Dauntless*, 121 Fed. 420; *In re California Nav. & Imp. Co.*, 110 Fed. 178; *In re Humboldt Lumber Mfrs. Assn.*, 60 Fed. 428.

20. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139.

1. *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.

measure of damages in such cases,² and the manifest effect of the statutory language is that in all cases to which the rule applies it is to be left to the jury to say, upon a consideration of the facts, what amount is a just compensation for the financial loss which the evidence shows will probably be directly or proximately caused by the death complained of.³

§ 51. Limited to Pecuniary Loss.—It is definitely settled that under the statute the damages recoverable in an action for wrongful death are always limited to the pecuniary loss suffered by the heirs of the person killed, by reason of his death.⁴ The jury is authorized to take into consideration the pecuniary injury resulting to those who were most nearly related to the deceased and who, in the ordinary course of human affairs, would probably have been the most benefited by his future labors if he had lived. The recovery is for the injury inflicted upon the heirs personally and not for injuries inflicted upon the

2. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361.

3. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Wolford v. Lyon Gravel B. M. Co.*, 63 Cal. 483; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010; *The Dauntless*, 121 Fed. 420; *In re California Nav. & Imp. Co.*, 110 Fed. 670. See *infra*, § 51, as to limitation of damages to pecuniary loss.

4. *In re Riccomi's Estate*, 185 Cal. 453, 14 A. L. R. 509, 197 Pac.

97; *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95; *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 704, 87 Pac. 376; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Pepper v. Southern Pacific Co.*, 105 Cal. 389, 38 Pac. 974; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243; *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. 1073; *The Dauntless*,

deceased.⁵ Of course, this cannot include any grievance personal to the deceased or any damage allowed in the interest of the people as punishment.⁶ Nor can it include the sorrow, grief or mental suffering occasioned to the heirs by the death.⁷

While there can be but one action brought or one recovery had, either by the personal representative or the heirs,⁸ and while the recovery in such an action should be of a single lump sum for all,⁹ the loss of each and all must be considered,¹⁰ and the total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death.¹¹

§ 52. General Rules for Computation.—Every case of damages for death depends on its own facts and circumstances. As decisions are made general rules are gradually formed for guidance in determining what is just and what circumstances may be considered in estimating damages in particular cases, but, it has been said, they will probably never reach the point where such rules can be invariable and not subject to modification by reason of

121 Fed. 420; *In re California Nav. & Imp. Co.*, 110 Fed. 670; *In re Humboldt Lumber Mfrs. Assn.*, 60 Fed. 428.

5. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063 (the word "heirs" in the statute is intended to limit the right of recovery to a class of persons who, because of their relation to the deceased, are supposed to be injured by his death); *Taylor v. Western Pac. Co.*, 45 Cal. 323, 333 (as to

statute of 1862); *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550.

6. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139.

7. See *infra*, § 64, as to exemplary and conjectural damages.

8. See *supra*, § 43.

9. See *supra*, § 49.

10. *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320.

11. *In re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97, per Angellotti, C. J.; *In re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97; *Robinson v. Western States etc. Co.*, 184 Cal. 401, 194 Pac. 39. See *infra*, § 67, as to distribution of damages.

circumstances. It follows from the rule limiting the damages to the pecuniary loss occasioned, and upon a consideration of that justice which the statute itself invokes, that the damages should include all pecuniary loss which the circumstances establish with reasonable certainty will be suffered by the beneficiary, because of the death. "Nothing less would be a just compensation for the injury, and anything more, or anything in the realm of improbability, conjecture or mere fancy would be beyond the purview of the statute and unjust to the defendant."¹² Pecuniary loss may be either a loss arising from the deprivation of something to which the heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances, it could be reasonably expected they would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral one only.¹³

Although it thus appears that the damages sustained are largely of a prospective nature,¹⁴ the pecuniary loss is to be determined by conditions existing at the time of the death, taking into consideration in measuring it the prospective benefits of which the beneficiaries were deprived. The liability of the defendant cannot be in any manner affected by matters occurring to the family subse-

12. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366, per Shaw, J.

13. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419 (stating and applying rule in action by parents for death of feeble-minded son); *Taylor v. Albion Lumber Co.*, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348 (action brought by administrator for benefit of nonresident alien mother); *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac.

320; *Sneed v. Marysville Gas etc. Co.*, 149 Cal. 704, 87 Pac. 376. See *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366 (stating the principle).

14. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95 (action for damages for death of wife and mother); *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, De Haven, J., concurring.

quent to that time.¹⁵ The jury in considering the probable future benefits which would have accrued must make its finding as to the present value of such benefits and not their future value.¹⁶

As to reasonable expectation of life.—The doctrine is settled that the damages should be calculated in reference to a reasonable expectation of the life of the deceased.¹⁷ It is manifest that in reaching a conclusion which must be based solely upon a consideration of what the deceased might probably have earned by his labor, or realized from his business in the future, for the benefit of his heirs, the court or jury is necessarily compelled to proceed upon very uncertain data.¹⁸ Consideration should therefore be given to the uncertainty of continuous or regular employment and the probable physical capacity to continue to earn for any certain number of years,¹⁹ and to the character and habits of the deceased.²⁰ It must be borne in mind, however, that the wage-earning capacity of the deceased is not the measure of damages in California; other elements of damage may also be taken into consideration in determining the pecuniary loss suffered.¹

15. *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544, per Lorigan, J. See *infra*, § 73.

16. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808.

17. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366. See *infra*, § 69, as to introduction of mortality tables in evidence.

18. *In re California Nav. & Imp. Co.*, 110 Fed. 670.

19. See *infra*, §§ 68, 69, 71.

20. See *infra*, § 71.

1. *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320; *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, 74 Pac. 13. See *infra*, § 53. See note, 3 A. L. R. 610, as to effect of increase in cost of living as affecting damages for personal injuries or death. See, also, *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361, in which the court said: "The purchasing power of money is much less now than in 1895 and this court cannot say that the award was excessive."

§ 53. Loss of Comfort and Society.—While nothing can be allowed for grief, sorrow and mental suffering of the heirs,² damages may be given, where the “circumstances” referred to in section 377, indicate that there may be pecuniary loss suffered on account of the deprivation of the society, comfort and protection of the deceased.³ In general, such damages are allowed where the loss is occa-

2. See *infra*, § 64.

3. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419; *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269; *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Grabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 Pac. 714; *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544; *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400; *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Hale v. San Bernardino etc. Co.*, 156 Cal. 713, 106 Pac. 83 (counsel may picture to jury condition of bereaved widow and child resulting from absence of supporting care and protection of deceased); *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972; *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, 68 Pac. 771; *Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Morgan v. Southern Pacific Co.*, 95 Cal. 518, 29 Am. St. Rep. 146, 17 L. R. A. 71, 30 Pac. 603; *Munro v. Pacific Coast etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal. 320; *Cook v. Clay Street Hill R. R.*

Co., 60 Cal. 604; *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 38; *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290; *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808; *Young v. Fresno etc. Irr. Co.*, 24 Cal. App. 286, 141 Pac. 29; *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 523; *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811; *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830. See *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91, following the *Beeson* case.

In the leading case on the subject the following instruction was given: “The court instructs you that if your verdict shall be for the plaintiff, such damages may be given by you to plaintiff as under all the circumstances of the case may be just. And in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by this plaintiff in the death of said George Beeson, by being deprived of his support; also the relations proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society.” *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20.

sioned to a parent from the death of a child,⁴ to a husband or children from the death of a wife or mother,⁵ or to a wife or children from the death of a husband and father.⁶ They are sometimes allowed in actions by parents for the death of an adult son or daughter.⁷

4. *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991 (action by father for death of minor daughter); *Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120 (but holding form of instruction erroneous); *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139 (but reversing the judgment of the trial court because exemplary damages were allowed); *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303 (stating generally); *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808 (son fifteen years old); *Young v. Fresno etc. Irr. Co.*, 24 Cal. App. 286, 141 Pac. 29 (where deceased was eighteen years of age); *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564 (action for damages for death of sixteen year old son).

5. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95. See, also, *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; and *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361, where testimony showed the devotion of the wife to her family and the loss of comfort occasioned by her death. See *infra*, § 58.

6. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A,

997, 167 Pac. 513; *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269; *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 Pac. 714; *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544; *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400; *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Hale v. San Bernardino etc. Co.*, 156 Cal. 713, 106 Pac. 83; *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604; *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 534; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811; *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830. See *infra*, § 55.

7. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419 (but stating that the pecuniary loss for the society, etc., of a feeble-minded son twenty-seven years old could not be great); *Pepper v. Southern Pacific Co.*, 105 Cal. 389, 38 Pac. 974 (declaring it doubtful whether such damages should be given where son is adult

But the right to such damages is not a universal one existing in every case. They are allowable only where the "circumstances" show a reasonable probability that the "society, comfort, and protection" afforded was of such a character that it would be of pecuniary advantage, and that a deprivation thereof would entail a pecuniary loss. It is pecuniary loss only and not the loss of an object of love and affection that the law recognizes as ground for allowing such damages.⁸ It is therefore error to instruct the jury in such language that it may draw the conclusion that damages may be given for any amount in excess of the pecuniary loss suffered by the heirs by reason of the death.⁹

and not living with parents). See *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303 (stating that loss of comfort, society and protection should be allowed in the case of a wife, or a mother, and it would seem, excluding by implication a father or collateral heirs); *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290. See *infra*, § 61.

8. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419, per Shaw, J. (stating that there could be no great loss of this nature where son is feeble-minded); *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183 (holding verdict of ten thousand dollars for death of man seventy-nine years of age excessive); *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, 68 Pac. 771; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Morgan v. Southern Pacific Co.*, 95 Cal. 516, 29 Am. St.

Rep. 143, 17 L. R. A. 71, 30 Pac. 603.

9. *Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120 (holding following instruction erroneous: "And in estimating that amount, as previously stated, you may take into consideration his health, physical ability to labor, and his habits. And in addition to that the law has also said that you may award damages in compensation for the loss of his society"); *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019 (expressing disapproval of instruction that the jury should consider "(a) The pecuniary loss, if any, suffered by the heirs of the deceased through his death; (b) also, the relations proved as existing between the deceased and such heirs at the time of his death, and the injury, if any, sustained by them by his death," and stating that the instruction, while somewhat similar, is less guarded than the one sustained in *Beeson v. Green Mountain Co.*, 57 Cal. 37); *Pepper v. Southern*

§ 54. Medical and Funeral Expenses.—It is a matter of doubt whether money expended in medical or surgical treatment of the deceased can ever be a proper element of damage.¹⁰ It is clear, however, that there can be no recovery for such charges unless the plaintiffs have incurred some loss on account thereof. It was early decided under the statute of 1862 that funeral expenses of the deceased are not recoverable except as special damages, if recoverable at all, and must be specially pleaded.¹¹ Such damages have been allowed, however, where specially pleaded, although there was no direct evidence that such funeral expenses had been paid by the plaintiffs.¹²

§ 55. Action by Wife or Child for Death of Father.—As is the rule with heirs generally, in an action for damages on behalf of a widow and children for the death of the husband and father, the pecuniary loss suffered is the measure of the damages.¹³ The amount of such damages sustained by a family in the loss of one who has provided for its support has been declared to be a difficult question.¹⁴ Among the elements which it has been held the jury may take into consideration is loss of support,¹⁵ ap-

Pacific Co., 105 Cal. 389, 38 Pac. 974; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603.

10. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733. See *Cleary v. City R. R. Co.*, 76 Cal. 240, 18 Pac. 269, allowing such damages, but this case was later overruled in *Morgan v. Southern Pac. Co.*, 95 Cal. 518, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, confining damages to actual pecuniary injury; *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, per Angellotti, J., stating, however, that defendant waives error in lower court where he refuses to have testimony stricken

from the files at the request of the plaintiff by proper motion.

11. *Gay v. Winter*, 34 Cal. 153.

12. *Koehl v. Carpenter*, 32 Cal. App. Dec. 331, 191 Pac. 43 (colloquy between counsel held sufficient to support implied finding that expense was incurred by plaintiffs).

13. *Shebley v. Peters*, 35 Cal. App. Dec. 462, 62 Cal. Dec. 217, 200 Pac. 364. See *supra*, § 51.

14. *In re Humboldt Lumber Mfrs. Assn.*, 60 Fed. 428.

15. *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400; *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Hale v. San Bernardino etc. Co.*, 156 Cal. 713,

propriate to the circumstances and condition in life of the deceased.¹⁶ The jury in estimating such damages may determine the amount that the deceased would in all reasonable probability have earned in the years yet remaining to him, may deduct from this the amount which he would reasonably require for his own personal use and maintenance, and give a verdict which would pecuniarily compensate the heirs.¹⁷ The jury should also give due weight to the fluctuations of business, if the deceased was engaged in business, and if not in business, the uncertainty as to what might have been the future condition of his health.¹⁸ Furthermore, the jury may consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which a father gives to his children, and in determining such value it is not limited to a case of similar service rendered by a hired servant, but should consider that they would be rendered by a father, having regard to the willingness of the deceased to nurture, care for, train and educate his children.¹⁹ And as has been stated in a preceding paragraph, damages for the loss of comfort and society of the deceased may be allowed, but they are to be considered only with reference to the value of the life of the deceased and the pecuniary loss to the heirs caused by the death.²⁰

106 Pac. 83; *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, 68 Pac. 771. See *infra*, § 56, as to legal right to support as entitling to substantial damages, and *infra*, § 72, as to evidence as to dependency.

16. *Taylor v. Western Pacific R. Co.*, 45 Cal. 323 (in the care of a wife).

17. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019, per *Harrison, J.*

18. *In re California Nav. & Imp. Co.*, 110 Fed. 670, per *De Haven, J.* See *In re Humboldt Lumber Mfrs.*

Assn., 60 Fed. 428, stating that habits and mode of life of head of family should also be considered; but see *infra*, § 56, as to legal right to support as entitling to substantial damage.

19. *Western States etc. Co. v. Bayside L. Co.*, 182 Cal. 140, 187 Pac. 735, per *Wilbur, J.*, stating that if the defendant believed that a more pointed and emphatic instruction limiting the liability to the pecuniary loss was necessary, it should have requested such instruction.

20. See *supra*, § 53.

It is not possible to measure in exact terms of money the loss which a surviving wife or child may have sustained through being deprived of the comfort and society of the deceased spouse or parent. For this reason, some play is allowed to the discretion of the jury by the provision of section 377 that such damages may be allowed as under all the circumstances of the case may be just.¹ The plaintiff's counsel has the right to address the jury upon the question of loss of society, comfort, care and protection, as well as of his support, and in doing so to picture the probable pecuniary privations and condition of the bereaved widow and child resulting from the absence of the supporting care and protection of the deceased, when such argument is directed to the question at issue and confined to the elements of damage allowed by law.²

When the widow dies before the action is tried or if the action is brought originally for the benefit of the children, the only question to be determined so far as the quantum of damages is concerned is what sum will be fair and just compensation to the children for the loss they have suffered by the death of their father. Considering the evil intended to be remedied by the statute, it is obvious that the amount of the recovery is not to be affected by the question whether or not the deceased left a widow, or if so, whether she survived until the trial of the action. If there are a large number of minor children who were entitled to be maintained and educated by their deceased father, the recovery should be larger than if there is but one child. Children have a right to demand from the father a comfortable support and a reasonably good education until they shall arrive at a sufficient age to maintain themselves. To accomplish that end would

1. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183, per Sloss, J. See *supra*, § 50.
2. *Hale v. San Bernardino etc. Co.*, 156 Cal. 713, 106 Pac. 83.

require a larger sum for a numerous family than if it consisted of but one or two persons.³

§ 56. Effect of Right to Support.—As has been seen, the right of action given by section 377 of the Code of Civil Procedure exists regardless of the condition of the heirs as to dependency.⁴ Deprivation of the support that deceased was morally and legally bound to furnish his wife and children may be the pecuniary loss suffered.⁵ They were entitled to demand of him a support in accordance with his station in life. Every wife and minor child has the right to receive such support from the husband and father, even if they are not dependent upon him at all, but have ample means of their own. It is that support of which they have been deprived by his death, and it is compensation for that loss that they are entitled to have by the verdict. The amount would be precisely the same if they were not dependent upon him as if they were.⁶ It has therefore been held that although the health and wages of deceased are important circumstances to be considered by the jury, it cannot be said as a matter of law that a wife and minor children are entitled only to nominal damages for the wrongful death of a husband and father, notwithstanding the absence of such evidence.⁷

§ 57. Minority of Child as Limiting Recovery.—Pecuniary interest of children in the loss of their parents does not necessarily end with their arrival at the age of major-

3. *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323, per Crockett, J., where widow died after commencement of action brought under statute of 1862. See note, 13 A. L. R. 225, for discussion of effect of death of a beneficiary upon right of action under death statute.

4. See *supra*, § 26.

5. *Fong Lin v. Probert*, 33 Cal. App. 762, 195 Pac. 437, holding that

action lies in favor of heirs regardless of condition of heirs as to dependency.

6. *Shebley v. Peters*, 35 Cal. App. Dec. 462, 62 Cal. Dec. 217, 200 Pac. 364, per curiam in bank.

7. *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. 1073. See *infra*, § 72, as to evidence of dependency of beneficiaries.

ity, but the jury may allow for the probable loss of benefit, if any, of a pecuniary value, which a child would probably receive from its parent after arrival at majority.⁸ Section 377 of the Code of Civil Procedure does not limit the right of recovery to minor children. The children as heirs of decedent are entitled to recover for the loss of any benefit of pecuniary value which they could with reasonable certainty have received from the decedent after their arrival at majority as well as during minority, measured by what would have been the probable duration of the life of the deceased.⁹

§ 58. Action by Husband or Child for Death of Mother. Manifestly there can be no fixed standard by which the loss occasioned to a husband and family by the loss of a wife and mother can be determined. Necessarily the law has committed ascertainment of such loss to the discretion and sound judgment of the jury.¹⁰ Although all the authorities are in harmony upon the fundamental principle governing an award for death, the elements of

8. *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400 where all instructions considered together contained correct exposition of law); *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95 (action against carrier for death of mother); *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063 (holding such instruction correct); *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361 (as to death of mother leaving children aged twenty, nineteen and fourteen respectively, also a husband and father).

9. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95, per Lorigan, J. See *infra*, § 68, as to expectancy.

10. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95.

It is of course the present value of the life which must be taken into consideration by the jury. See *supra*, § 52. But where the jury are otherwise fully and fairly instructed as to the various elements of damages recoverable, it has been held not to be error to refuse an instruction requested by the defendant that "the pecuniary value of the life of the deceased to the plaintiffs is the value in money of the life of said decedent to the plaintiffs at the time of her death." *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149.

damage differ according to the position of the plaintiffs and relationship to the deceased. Thus the elements of damage to a husband for the loss of his wife are not identical with the elements of damage to minor children for the loss of their mother. Fundamentally the law seeks to compensate in terms of money for the loss to children of their reasonable expectations of financial benefit from the continued existence of the parent, including in this estimate the loss of the nurture, instruction, training and care.¹¹ And in determining such value the jury is not limited to a case of similar services rendered by a hired servant but may take into consideration the value of such services when rendered by a mother to her children, having regard to the evidence in the case, if there be any, as to the ability and willingness of the deceased to nurture, care for, train and educate them.¹² As has already been pointed out, the pecuniary interest of the children in such services does not of necessity terminate with their arrival at the age of majority.¹³

In determining the damages sustained by a husband of a deceased wife the jury may take into consideration the pecuniary loss, if any, sustained by him in being deprived of her services, society and comfort.¹⁴

Applying these principles it has been held proper to instruct the jury that a husband is entitled to recover the value of the present and future services of the "wife and

11. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149, per Henshaw, J. (where damages of seven thousand five hundred dollars were awarded for loss of mother); *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95 (stating that the jury may consider the value of the mother's services to her children, her care and labor bestowed upon them, her ability to care for, train and assist them, and

her efforts for their welfare); *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.

12. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063. See *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320, reviewing cases.

13. See *supra*, § 57.

14. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95. See *supra*, § 53.

companion," and the children the value of the mother's "nurture and instruction, moral and physical, and intellectual training."¹⁵ So, an instruction in effect directing the jury to consider and ascertain the losses of father and children respectively by the death of the mother as distinct elements in the lump sum of damages awarded has been held proper.¹⁶

§ 59. Action by Parent for Death of Minor Child.—

As with other relationships, in actions by a parent for the death of a child the damages allowable are those, and those only, which have been or may be suffered by the parent.¹⁷ No damages can be given in such an action for pain or anguish inflicted on the child or for any pecuniary injury personal to such child,¹⁸ or for the mental distress of the parent consequent on the death.¹⁹ The verdict must be limited to such loss, if any, as the parents have suffered financially,²⁰ that is, the probable value of the life to those in whose behalf the action is brought.¹

15. *Johnson v. Southern Pacific R. R. Co.*, 154 Cal. 285, 97 Pac. 520.

16. *Johnson v. Southern Pacific Co.*, 154 Cal. 285, 97 Pac. 520. See *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320, reviewing cases. And see *infra*, § 67, as to distribution of damages.

17. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366.

18. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366. See *Penoza v. Northern Pac. Ry. Co.*, 215 Fed. 200 (in which it is stated that under Code Civ. Proc., § 376, no recovery is allowed for the suffering of the deceased child nor for the grief and sense of bereavement on the part of surviving relatives).

19. *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 69 Am. St. Rep. 216, 50 Pac. 25; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, *De Haven, J.*, concurring. See *infra*, § 64.

20. *Bowdoin v. Southern Pac. R. Co.*, 178 Cal. 634, 174 Pac. 664; *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234 (quoting with approval instruction as given by lower court).

1. *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163 (holding that an instruction that the pecuniary loss means the "value in money, if any, of the life of the deceased to her father and mother," is not erroneous by reason of the expression "to the father and mother," who were the only persons

The jury, in estimating such loss, may consider the probable future benefits that would have accrued to a father from the services of the minor in case the accident had not occurred,² and it may also consider the pecuniary loss the parent has suffered from the deprivation of the comfort, protection and society of the child.³ The age, character, disposition and health of the deceased are all to be taken into consideration. Therefore, it is left to the jury to say what it deems just, and if it has not made its estimate upon a wrong basis and has not acted under the influence of passion or prejudice, its judgment is final.⁴

§ 60. Period of Minority as Limiting Damages Recovered.—Although it has been stated that the jury should award as damages to a parent for the death of a child for the pecuniary loss of the services of the deceased through the period of minority only,⁵ it seems that such a statement is purely dictum,⁶ and the true rule is that the recovery in case of the death of a minor is not limited to the earning capacity of the son during his minority, but it includes the present value of the reasonable benefit which the parents would probably have received after his

to whom the loss was of any consequence); *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139.

2. *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808; *Young v. Fresno etc. Irr. Co.*, 24 Cal. App. 286, 141 Pac. 29 (such damages may be recovered as are just); *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564 (holding that the parental duty of educating the son and his desire to help along with his own education cannot affect the time spent at school from being considered as service of the son to the plaintiff).

3. See *supra*, § 53.

4. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139, per Temple, J.

The jury in considering the probable future benefits that would accrue to a parent for the services of the minor had he not been killed must make their finding as to the present value of said benefits and not the future value. *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808. See *supra*, § 52.

5. *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564 (action by mother for death of minor son).

6. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366, discussing cases.

majority and during the period of their common expectancy of life.⁷ In many cases where the minor is near majority, the certainty of pecuniary loss to the parent, accruing after his minority, would be as great as the certainty of such loss during minority, and the expectation of benefits for many years thereafter would be as well established as in the case of the death of an adult. In other cases, where the child is a mere infant, the expectation of pecuniary benefits to accrue in the years following its arrival at majority would be so remote that it could not justly be made the basis for a large addition to the damages.⁸ In the case of a daughter it has been held that there is nothing in the law which limits the consideration by the jury of the loss of comfort and society of a child to the period of minority, but as to loss of services it is proper for the jury to take into consideration their probable value, had she lived, through her minority or until her marriage; independent of this a parent may not look to his female child for protection and support.⁹

§ 61. Action by Parent for Death of Adult Child.—In actions by a parent for the death of an adult child the fundamental principle obtains that the damages recoverable are those, and those only, which have been or may be suffered by the parent.¹⁰ In order to justify a recovery it should

7. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808.

8. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366, per Shaw, J.

9. *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991; but see *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163, stating that parents may have a legal right

to financial support from a child at any time during its life, and that therefore an instruction asked against the evidence that the damages should be limited to a nominal sum was properly refused in an action for the death of a daughter eighteen years old. See Civ. Code, § 206.

10. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419. See *Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. 970, holding that in an action by a mother for the death of her son

appear from the age, earnings, and habits of deceased and the amount of help given by him, that benefits had actually been received or could reasonably be expected.¹¹ In ascertaining the damages, the age of the parents, the earning capacity of the child and the amount which might have been reasonably expected to be contributed by him should be considered. It is the shorter expectancy of life that is to be taken into consideration. Thus if the expectancy of life of the parents is shorter than that of the child, the benefits to be considered are those only which might accrue during the life of the surviving parents.¹² As in other cases, the pecuniary loss includes the deprivation of the comfort, society and protection of the deceased.¹³ Where the child has performed services for the parents it is proper to consider the charges for similar services in the vicinity.¹⁴

§ 62. Benefit to Estate.—The damages recovered are for the benefit of the heir or heirs, and do not constitute any part of the estate of deceased.¹⁵ Clearly, they can be no

brought to compensate herself alone it was proper to reject a requested instruction that "the law does not contemplate that the damages awarded to the plaintiff . . . should be a compensation to her heirs, or to any other person or persons." See *supra*, § 51.

11. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419, applying rule in action by parents for death of feeble-minded son of twenty-seven.

12. *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419, per Shaw, J., action by parents for death of feeble-minded son of twenty-seven, parents being respectively sixty and sixty-nine years old. See *infra*, §§ 68, 69.

13. See *supra*, § 53. See *Pepper v. Southern Pacific Co.*, 105 Cal. 389,

38 Pac. 974, stating that it is doubtful whether the pecuniary loss would include such damages where the deceased was an adult son of twenty-five years of age and was not living with the plaintiff, his father.

14. *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290, where daughter took care of her invalid mother over a long period of time.

15. *In re Riccomi's Estate*, 185 Cal. 458, 14 L. R. A. 509, 197 Pac. 97; *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec.

part of the assets of the deceased,¹⁶ and are not liable for the decedent's debts.¹⁷ And in the case of the death of a wife, the damages recoverable are not the product of the community effort or of community accumulations.¹⁸ It therefore follows that where the action is brought or the money recovered by the personal representative, the bringing of the action does not make the damages recovered a part of the estate of the deceased, but such personal representative is acting solely as a statutory trustee for the benefit of the heirs on account of whom the recovery is had.¹⁹ It has similarly been held that the fact that minors appear by a guardian ad litem as they are compelled to do does not affect their interest in the judgment or vest in the guardian ad litem any part of or interest in it.²⁰

§ 63. Nominal Damages.—As has heretofore been stated the loss for which recovery may be had is the pecuniary loss to survivors.¹ And although the heirs are entitled to substantial damages where there was a legal right to support from the deceased,² there is no such right where the action is brought by adult collateral heirs,³ or any heir who has not suffered substantial pecuniary injury. It

581, 207 Pac. 35; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811. See *supra*, § 24.

16. *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

17. *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35.

18. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063. See *supra*, § 24, as to meaning of word "heirs."

19. *In re Biecomi's Estate*, 185 Cal. 458, 14 L. R. A. 509, 197 Pac. 97; *Ruiz v. Santa Barbara etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Webster*

v. Norwegian M. Co., 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811. See *supra*, § 28, and *supra*, § 36.

20. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063. See *supra*, § 29.

1. See *supra*, § 51.

2. See *supra*, § 56.

3. *Burk v. Arcata etc. R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065.

follows inevitably that there can be no substantial recovery on account of any heir who has not so suffered.⁴ In such a case the mere fact that they are heirs does not tend to show pecuniary damage, and in the absence of other proof tending to show actual damage or at least probable loss resulting to them from the death, the jury should be instructed that recovery must be limited to nominal damages.⁵ An action for damages by heirs who have not sustained damage will be dismissed in courts of admiralty, since in such courts nominal damages for personal torts are not awarded.⁶

§ 64. Conjectural and Exemplary Damages.— Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from a death.⁷ It follows that where the language of instructions is such as clearly to convey the impression to the minds of the jurors that they are at liberty to assess damages on a basis outside of and beyond that of pecuniary loss, it is erroneous.⁸ Following the English court's declaration of the purpose of Lord

4. In *re* Riccomi's Estate, 185 Cal. 458, 14 L. R. A. 509, 197 Pac. 97.

5. In *re* Riccomi's Estate, 185 Cal. 458, 14 L. R. A. 509, 197 Pac. 97; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065; *In re California Nav. & Imp. Co.*, 110 Fed. 670.

6. In *re* California Nav. & Imp. Co., 110 Fed. 670. See, also, *supra*, § 37, as to allegation of pecuniary loss, and *infra*, § 72, as to evidence of dependency.

7. *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065.

8. *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577 (such vice

is not cured by another instruction that only pecuniary loss can be considered in awarding damages); *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, *De Haven, J.*, concurring. But see *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400, where it was held to be not reversible error that the jury was instructed that the damages were not limited to the actual pecuniary damage sustained by the plaintiff by reason of loss of services of deceased, where the jury was elsewhere fully and correctly instructed as to the proper standard for measuring damages. See, also, cases cited *infra*.

Campbell's Act, it has been held that the action under section 377 of the Code of Civil Procedure is intended for compensating the families of persons killed, not for the solacing of their wounded feeling,⁹ or awarding a penalty for the death.¹⁰ It is therefore clear that sorrow and mental anguish are not elements of damage and that nothing can be recovered as a solatium for wounded feelings.¹¹ It has been reasoned that the standard for the admeasurement of the rights of parties would be too vague and uncertain if the jury were to take these elements into consideration.¹² On the same principle no damages can be

9. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Munro v. Pacific Coast Dredging Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

10. *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

11. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366 (stating that juries should be insistently cautioned not to allow compensation for sorrow or distress or for a pecuniary loss which is remote or conjectural in the particular case); *Green v. Southern Pacific Co.*, 122 Cal. 563, 55 Pac. 577; *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24

Pac. 303; *Beeson v. Green Mountain Co.*, 57 Cal. 20; *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 523; *The Dauntless*, 121 Fed. 420; *In re California Nav. & Imp. Co.*, 110 Fed. 670.

See *Cleary v. City R. R. Co.*, 76 Cal. 240, 18 Pac. 269, holding that jury could take into consideration not only the loss of the child's services during minority and the medical attendance and funeral expenses, but also the mental anguish and suffering of the parents. Overruled in *Morgan v. Southern Pac. Co.*, 95 Cal. 518, 29 Am. St. Rep. 146, 17 L. R. A. 71, 30 Pac. 603, confining damages to actual pecuniary injury. See, also, *Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 320, which infers that such damages may be given, but as the dictum is later explained in *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 146, 17 L. R. A. 71, 30 Pac. 603, it cannot be held to go beyond the rule as stated in the text.

12. *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 146, 17 L. R. A. 71, 30 Pac. 603 (stating such a rule would afford an opportunity to run into wild and

given for pain or anguish inflicted on the injured person, or for any pecuniary injury personal to such person.¹³

The statute of 1862 (Stats. 1862, p. 447) expressly allowed the jury to give exemplary damages, and this provision was carried into the first edition of the codes. It authorized such damages, pecuniary and exemplary, as the jury should deem just.¹⁴ In 1874 section 377 was amended by striking out the words "pecuniary and exemplary." The purpose of this amendment was to take away the right to exemplary damages, and to make the rule accord with the general rule elsewhere.¹⁵

§ 65. Excessive Damages.—As most of the loss suffered by the heirs is prospective in its nature, relating as it does to the loss of future service and necessarily based upon probabilities, and upon data which in many respects are uncertain, the estimate of such damages calls for the exercise of a large discretion upon the part of the jury.¹⁶ But in fixing the amount the jury is bound by the fundamental rule that pecuniary damage is the limit of recovery, and the damages allowed must bear some reasonable relation to the pecuniary loss shown by the evidence.¹⁷

excessive verdicts); *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

13. *Parsons v. Easton*, 134 Cal. 764, 195 Pac. 419; *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, L. R. A. 1918A, 997, 167 Pac. 513; *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1918D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Bond v. United Railroads*, 159 Cal. 270, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50, 113 Pac. 366; *The Dauntless*, 121 Fed. 420; *In re California Nav. & Imp. Co.*, 110 Fed. 670.

14. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Myers v. San Francisco*, 42 Cal. 215.

15. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139, per Temple, J. See supra, §§ 14, 15.

16. *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, De Haven, J., concurring; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010.

17. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603, De Haven, J., concurring. See supra, § 51.

The amount, it has been said, is committed first to the sound discretion of the jury and next to the discretion of the judge of the trial court, who, in ruling upon a motion for a new trial, may consider the evidence anew, review anew the facts, and set forth the verdict if it is not just.¹⁸ Upon appeal the power of the appellate court over the verdict exists only where an excess appears as a matter of law or the amount allowed is such as to suggest at first blush passion, prejudice or corruption on the part of the jury,¹⁹ or, as sometimes stated, so disproportionate

18. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; *Hale v. San Bernardino etc. Co.*, 156 Cal. 713, 106 Pac. 83. But see *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830, stating that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment that the judge is at liberty to interpose his judgment as against that of the jury, and that the appellate court is bound by the same rule.

19. *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (action for death of child run over by automobile, holding that verdict of five thousand dollars was not so excessive as to justify reversal); *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269 (upholding award of twelve thousand five hundred dollars for death of wage-earner and rancher whose life expectancy was sixteen years); *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712 (upholding award of eighteen thousand dollars

for death of wife and mother assisting in husband's business); *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 Pac. 714 (upholding award of twenty thousand dollars for death of skillful miner); *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359 (holding that twenty thousand dollars damages is not excessive damages for death of man fifty-seven years of age, in good health and contributing at least two hundred dollars a month to support of wife and children); *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 43 Pac. 366; *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95 (upholding award of fourteen thousand dollars for death of devoted wife and mother); *Hale v. San Bernardino etc. Co.*, 156 Cal. 713, 106 Pac. 83 (upholding verdict of twelve thousand dollars for death of twenty-six year old man earning seventy-five a month); *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, 74 Pac. 13 (upholding award of eighteen thousand dollars for death of wage-earner); *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063 (upholding verdict of fourteen thousand dollars for death of cul-

to the loss as at first glance to shock the conscience.²⁰ When the appellate court is asked to review the action of the trial court, where in the exercise of its discretion it has seen fit to set aside the verdict, every intendment is

tured, talented, devoted wife and mother); *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269 (upholding verdict of three thousand dollars for death of son earning forty or fifty dollars a month); *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604 (upholding verdict of eight thousand dollars for death of fifty-nine year old game and poultry dealer); *Myers v. San Francisco*, 42 Cal. 215 (holding that verdict of five thousand dollars for death of infant daughter of plaintiff was not so excessive as to be reversed and that the discretion of the jury should not be interfered with by the court except in cases of the most palpable abuse of such discretion); *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808 (upholding award of three thousand five hundred dollars where joint expectancy of father and son was twenty-five years); *Kreitzer v. Southern Pacific Co.*, 38 Cal. App. 654, 177 Pac. 477 (upholding award of seven thousand five hundred dollars for death of man whose life expectancy was over seventeen years); *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361 (upholding verdict of eleven thousand seven hundred and eighty-five dollars for death of fifty-one year old wife and mother); *Pell v. Herbert*, 33 Cal. App. 730, 166 Pac. 386 (upholding verdict of two thousand dollars for death of dissolute and unthrifty husband);

Catlin v. Union Oil Co., 31 Cal. App. 597, 161 Pac. 29 (upholding award of seventeen thousand dollars for death of miner and carpenter, forty-four years old); *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90 (upholding award of ten thousand dollars for death of twenty-three year old son); *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 534; *McGrory v. Pacific Electric Ry. Co.*, 22 Cal. App. 671, 136 Pac. 303 (upholding verdict of twenty thousand dollars for death of man twenty-five years of age, earning twenty dollars a week); *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564 (upholding award of five thousand dollars for death of minor son of sixteen); *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 312, 84 Pac. 1010 (upholding award of five thousand dollars for death of twenty-seven year old father); *Western Fuel Co. v. Garcia*, 255 Fed. 817.

20. *Fong Lin v. Probert*, 33 Cal. App. Dec. 762, 195 Pac. 437 (upholding verdict of five thousand four hundred dollars for death of Chinaman receiving forty-five dollars and board and lodging); *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290 (holding verdict of five thousand dollars for death of daughter upon whom invalid mother was dependent not excessive); *Bowdoin v. Southern Pacific Co.*, 178 Cal. 634, 174 Pac. 664 (stating that damages

to be indulged in support of the action of such court.¹ It follows that an order granting a new trial for excessive damages is in the discretion of the trial court and will not be disturbed upon appeal if there is a reasonable or fairly debatable justification for its action.²

Although, as has just been stated, the power of the reviewing court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice or corruption on the part of the jury, and the trial court must practically bear the whole responsibility in every case,³ still if the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the exercise of cool and dispassionate discretion by the jury, the verdict must be held excessive.⁴

of one thousand dollars for death of fifteen year son ejected from freight train and run over by switch engine did not seem to be slight in view of the circumstances); *Koehl v. Carpenter*, 32 Cal. App. Dec. 331, 191 Pac. 43 (action by parents for death of daughter run down by automobile while alighting from street-car). See *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269 (holding that an instruction quoting Civ. Code, § 3281, defining damages, has no tendency to impress the jury with the idea that defendant is a law-breaker).

1. See *APPEAL AND ERROR*, vol. 2, p. 940.

2. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019 (where new trial was granted on basis of excessive damage where deceased was a debilitated man of sixty-nine earning one hundred and ten dollars a month).

3. See *APPEAL AND ERROR*, vol. 2, p. 917; *DAMAGES*, ante, p. 836.

4. *Wiezorek v. Ferris*, 176 Cal. 353, 167 Pac. 234 (holding excessive verdict for ten thousand dollars damages for death of six year old child where there was no averment or proof of special damage nor anything to show that the pecuniary value of the child to his parents would have been any greater than that of the ordinary boy of his age); *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183 (setting aside verdict of ten thousand dollars for death of man almost seventy-nine years of age); *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25 (setting aside verdict of six thousand dollars for death of infant four and a half years old); *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 17 L. R. A. 71, 30 Pac. 603 (holding excessive award of

Where upon appeal by the defendant from a judgment in favor of the plaintiff, the appellate court determines that the only ground warranting a reversal is the erroneous admission of incompetent evidence on the subject of damages, it may, instead of ordering a reversal, affirm the judgment and order, on condition that the plaintiff remit such a portion of the judgment as is shown to measure the extent to which the defendant is prejudiced by the introduction of the incompetent evidence.⁵

§ 66. Inadequate Damages.—A new trial may be granted as well when the damages are too small as when they are too large.⁶ The plaintiffs are entitled to have the case tried before a jury which has a proper conception of what is just and which will render a verdict for the defendant, or, if the evidence shall justify, in favor of the plaintiffs with damages in a sum reasonably adequate to the case as presented.⁷ It has therefore been held that the trial court does not abuse its discretion in granting a new trial where the verdict is for two hundred dollars for the death of a man fifty-six or fifty-seven years of age earning from four to seven dollars a day.⁸ And it has similarly been held that a verdict of one dollar damages for

twenty thousand dollars for death of female child two years old). See, also, *Parsons v. Easton*, 184 Cal. 764, 195 Pac. 419, stating that no great sum could reasonably be given as damages for deprivation of society, comfort and protection of a feeble-minded son of twenty-seven with an earning capacity of thirty dollars a month, who was intermittently in the insane asylum, and holding that verdict of six thousand dollars to parents of sixty-nine and sixty years of age, respectively, was too great for the wrongful death of the son.

5. *Simoneau v. Pacific Electric*

Ry. Co., 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544, where evidence of illness of heirs subsequent to death of deceased was improperly introduced. See *APPEAL AND ERROR*, vol. 2, p. 584.

6. *Mariani v. Dougherty*, 46 Cal. 26. See *DAMAGES*, ante, p. 725.

7. *Walford v. Lyon Gravel G. M. Co.*, 63 Cal. 483, per Myrick, J.

8. *Mariani v. Dougherty*, 46 Cal. 26, where deceased had four sons and one daughter, all of whom had reached the age of majority except one who was dependent upon him for support.

the death of a man having an expectancy of life of thirty-six years and who was earning about one hundred dollars a month is trifling with the forms of law and the court is justified in granting a new trial.⁹ It is clear that it is not for the defendant to take advantage of the inadequacy of the verdict for such a purpose as to urge that the jury did not believe the testimony of the plaintiff's witness.¹⁰

§ 67. Distribution of Damages.—The statutes of many of the states make provision for the adjustment and distribution among the heirs of the moneys recovered, but the California statute is silent upon that subject.¹¹ The original statute relative to actions of this character¹² contained a provision directing distribution of the proceeds of the action to "the widow and next of kin," "in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate." When, however, the codes were enacted the whole subject matter was revised and the direction as to distribution entirely omitted,¹³ thus indicating, it has been said, an intention to restore the action to what it was originally intended to be; a means of providing for the family and each member thereof that which each could

9. *Wolford v. Lyon Gravel C. M. Co.*, 63 Cal. 483, where it was admitted by pleadings that deceased had during their married life supported himself and his wife comfortably.

10. *Bowdoin v. Southern Pacific Co.*, 178 Cal. 634, 174 Pac. 664, where defendant claimed that verdict of one thousand dollars was light and showed that jury did not wholly believe testimony of plaintiff's witness.

11. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149; *Beeson v. Green Mountain G.*

M. Co., 57 Cal. 20 (stating that until the matter is brought up for decision the court will have no occasion to consider the question, but that much embarrassment will be felt when the question arises). See extended note, 14 A. L. R. 516, as to division among beneficiaries of amount awarded by jury or received in settlement upon account of wrongful death.

12. Stats. 1862, p. 448.

13. In *re Riecomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97, per Angellotti, C. J. See *supra*, § 15.

have expected to receive in the way of comfort and support from the lost relative. It is not intended by the statute that the amount recovered shall be divided into integral or proportional parts,¹⁴ and it is now expressly held that the distribution among "heirs" of damages recovered by the statutory trustee must be upon the basis of the pecuniary loss of each rather than upon his rights under the succession statutes.¹⁵ It is true that the word "heirs" in the statute denotes all those who are capable of inheriting from the deceased person under the statutes of succession, but the recovery is for the injury inflicted upon the plaintiffs personally and not for injuries inflicted upon the deceased, and the word "heirs" in the statute is intended to limit the right of recovery to a class of persons who, because of their relation to the deceased, are supposed to be injured by his death.¹⁶ Inasmuch as the damages recovered constitute no part of the estate of the deceased,¹⁷ a proceeding to compel distribution among the heirs is not one within the probate jurisdiction of the superior court.¹⁸ In an action by a father for the death of his minor child in which action the mother is not joined, the proceeds of the judgment in favor of the father become community property.¹⁹

14. *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320, per Sloss, J.

15. *In re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97, per Angellotti, C. J., where contention was made that distribution should be according to statutes of succession.

16. *In re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97, per Angellotti, C. J.; citing *Redfield v. Oakland etc. Co.*, 110 Cal. 277, 290, 42 Pac. 822, 823, and distinguishing cases from other states decided under other statutes. See *supra*, § 24.

17. See *supra*, § 62.

18. *In re Riccomi's Estate*, 185 Cal. 458, 14 A. L. R. 509, 197 Pac. 97, but holding in the particular case that court had jurisdiction, and its order or judgment was an effective adjudication as between the parties.

See note 14 A. L. R. 538, as to effect of death of distributee after judgment on division among beneficiaries of amount awarded by jury or received in settlement on account of wrongful death.

19. *Keena v. United Railroads of San Francisco*, 37 Cal. App. Dec. 671, 63 Cal. Dec. 581, 207 Pac. 35,

Evidence as to Damages.

§ 68. **Life Expectancy.**—It is not only important to take into consideration the life expectancy of the deceased had he not been injured, but it is also important to consider the life expectancy of the heirs who are seeking to recover for a wrongful death. It is manifest that the damages must be less when the expectancy of the surviving relatives is only a few years than could be awarded in a case in which the expectancy of the surviving relatives is for a longer period of time.²⁰ However, the jury may not in any event award damages for any period extending beyond the probable time of the life of the deceased.¹ Thus in an action by a mother for the death of her son, evidence has been held admissible to show that she had not been ill since she was nine years old, as bearing upon her state of health and her expectancy of life.² Similarly, the fact that a son was robust and had practically reached manhood at the time of his death is a fact to be considered as establishing a reasonable probability that the same condition would have continued for some time after he became of age.³ In the absence of evidence to the contrary it is presumed that a person is in average normal health.⁴

in the opinion in the district court of appeals rendered by Sturtevant, J., it was declared that one moiety of the proceeds passes to each spouse, but this portion of the opinion was disapproved by the supreme court in bank in denying a rehearing, but the portion of the opinion which declared the proceeds of the judgment to be community property was expressly approved.

20. *Redfield v. Oakland C. S. Ry.*

Co., 110 Cal. 277, 42 Pac. 822, 1963; *The Dauntless*, 121 Fed. 420.

1. *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.

2. *De Witt v. Floriston Pulp & Paper Co.*, 7 Cal. App. 774, 96 Pac. 397.

3. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366.

4. *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361.

§ 69. **Mortality Tables.**—Inasmuch as the probable duration of the life of deceased, had he lived, and the expectation of life of the heirs are factors to be considered by the jury,⁵ the court may properly admit in evidence mortality tables to show the probable duration of the life of the deceased and also the probable duration of life of each beneficiary who is a plaintiff.⁶ As courts take judicial notice of the standard tables of life expectancy, a table which is satisfactory to the trial court is admissible without preliminary proof as to its authenticity and reliability.⁷ And the jury is entitled to consider such table as bearing on the question of the probable length of life and as tending to show the ordinary experience in like cases.⁸ However, the jury should also consider the expectancy of the life of deceased in view of the evidence. Thus where the evidence shows that a person was debilitated and aged beyond his years at the time of his death, the jury is not authorized to consider that the expectancy of the deceased according to the mortality tables would be fully realized and that he would have constant employment during that expectancy without interruption from sickness, but it is authorized to consider only the reasonable probability of the continuance of the life, health and

5. See *supra*, § 52, as to general rules for computation, and see *supra*, § 68, as to life expectancy.

6. *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95 (holding, however, in connection with such admission that the jury should be instructed that in no event can damages be awarded beyond the probable duration of the life of the deceased); *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, 68 Pac. 771; *Dallas v. De Yoe*, 35 Cal. App. Dec. 601, 200 Pac. 361 (such tables are admissible but not essential).

7. *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712; *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771 (court may or may not require evidence as to authenticity, depending upon whether its own knowledge is satisfied); *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808.

8. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019, per Van Fleet, J.

vigor of the deceased in view of the evidence.⁹ On the other hand, it has been held that an instruction relative to the use of tables is not objectionable on the ground that it is applicable to the case of a man in good physical condition where the evidence shows that he was strong and healthy at the time of his death although he had suffered a recent injury which had temporarily impaired his health.¹⁰

§ 70. Property or Benefits Accruing to Heirs.—The English courts adopted the broad view that whatever property the heirs could be shown to have received through the death was competent evidence for the consideration of the jury in its efforts to determine the amount of damage occasioned by the death. Thus it was held that if the father's income was from fixed property, wholly independent of his own exertions, and this property went to the heirs, this could be shown in order to lessen the damages which might otherwise be awarded. The other doctrine, which may be designated the American doctrine, since it finds acceptance in most of the courts of the United States, including California, announces the opposite view, that none of this evidence is admissible and none of it entitled to the jury's consideration. "Under this doctrine the true question is, what had the plaintiffs the right to expect from the parent during his life? and for the loss of this they are to be compensated. What they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving and would have received had he lived. It is the destruction of their ex-

9. *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019.

10. *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 Pac. 269, where the physician who treated de-

ceased at a time of the prior accident described him as a "strong, hearty man" when the accident resulting in his death occurred.

pectations in this regard that the law deals with, and for which it furnishes compensation."¹¹

§ 71. Earning Capacity and Habits of Deceased.—Evidence of what deceased has done in the past furnishes, it has been said, at least some, if not indeed the most satisfactory, basis for estimating what he would in all likelihood have done in the future.¹² The jury in determining the pecuniary loss may therefore consider what the deceased would probably have earned and accumulated in his business or calling during the residue of his life, considering also his age, health, habits of industry, ability, and disposition to labor, and the probabilities of his length of life.¹³ Thus evidence that a minor son approaching majority was receiving good wages with which he helped to support his mother is admissible as establishing a reasonable probability that such condition would exist after he came of age.¹⁴ While earning capacity may properly

11. *McLaughlin v. United Railroads*, 169 Cal. 494, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205, 147 Pac. 149, per Henshaw, J., stating that other courts take a middle ground. See *Hurd v. City and County of San Francisco*, 33 Cal. App. Dec. 211, 193 Pac. 507, holding that in action by administratrix for death of husband by wrongful act of municipality, where it appeared that widow was receiving monthly pension from municipality and the jury was instructed that the widow had thereby waived all further claims from city, and recovery, if any, must be for damages suffered by children, such instruction, if erroneous, did not constitute reversible error where the jury found a general verdict in favor of the municipality. See, also, *supra*, § 42, as to settlement or release.

12. *Diller v. Northern Cal. Power Co.*, 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359.

13. *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400, per Lorigan, J. See *supra*, § 68, as to expectancy of life.

14. *Bond v. United Railroads*, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; See *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, where earnings of deceased and his expenditures for the household were introduced.

And it has been held not to be prejudicial error to ask a witness of the defendant whether such witness had discussed with the decedent the matter of increasing his compensation where the witness answers that he does not remember; *McGrory v. Pacific Electric Ry. Co.*, 22 Cal. App. 671, 136 Pac. 303.

be considered in determining the amount of damages it is not determinative of such amount.¹⁵ As has already been pointed out, a wife and children may be entitled to substantial damages although there is no evidence of the wages of a deceased husband and father.¹⁶ It has been held that where a physician in regular practice was killed and the value of his services to his patients, or the value of his earnings was not presented to the jury, still the jury was justified in giving a substantial award when there was evidence that he was a regular practicing physician, that he possessed a number of patients, some of whom he was attending at the time of his injury, and that he was a strong man in the prime of life.¹⁷ It has been said that perhaps the defendant may have the right to prove that deceased could earn little or nothing in order to reduce the damages in a suit by the wife and minor children.¹⁸

Evidence of the habits of the deceased may be introduced as showing the extent of the probable value of the life of such person to his beneficiaries.¹⁹ Thus the admission of evidence that he was not addicted to drink and that he did not gamble is competent and pertinent inasmuch as it has some bearing upon the value of his life.²⁰

15. *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830. See *supra*, §§ 52, 53.

16. See *supra*, § 56, and *infra*, § 72.

17. *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830, sustaining verdict for twelve thousand dollars.

18. *Shebley v. Peters*, 35 Cal. App. Dec. 462, 200 Pac. 364.

19. *Taylor v. Western Pacific R. Co.*, 45 Cal. 323, where widow died after commencement of action.

20. *Barboza v. Pacific Portland Cement Co.*, 162 Cal. 36, 120 Pac. 767, See *Pell v. Herbert*, 33 Cal. App. 730, 166 Pac. 386, holding that even though evidence showed that deceased was dissolute and unthrifty and not a good support to his family, still a verdict of two thousand dollars is not so excessive as to justify the conclusion that the jury was moved by undue passion or prejudice.

See note, 9 A. L. R. 1405, as to evidence of intemperate habits on question of damages.

§ 72. Dependency of Beneficiaries.—The admissibility of evidence to show that the heirs were dependent upon the deceased for support depends upon the question whether that fact does or does not enhance their loss. It is clear that such evidence is not admissible where the suit is by the wife and minor children of the decedent and this is so because their loss is the same regardless of their dependence upon him for support. They are entitled to support from him in any event, even if they do not get it. The presumption, in the absence of proof, is that they did get the support they were entitled to and evidence is not necessary to prove that fact. Evidence of his ability to earn money may be admissible to show the quality of the support he should give his wife and children, but evidence that they had no means of their own and that they were dependent upon him is not admissible, because it is immaterial and because it is likely to be injurious on the question of damages from the fact that it tends to arouse a sympathy which has no place in the estimation of the pecuniary loss.¹ And it is clearly prejudicial to introduce

1. *Shebley v. Peters*, 35 Cal. App. Dec. 462, 200 Pac. 364 (but holding that introduction of such evidence did not have prejudicial effect in instant case). *Kerrigan v. Market Street Ry. Co.*, 138 Cal. 506, 71 Pac. 621 (holding that it is erroneous for a court to instruct a jury that it may take into consideration the fact that deceased was the sole support of the plaintiffs). But see *Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722 (holding evidence admissible to show to what extent the plaintiffs were supported by their father's earnings); *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 Pac. 972 (holding that an instruction that if the verdict be in favor of plaintiffs the jury may consider the admitted fact that the deceased was

the sole support of the plaintiffs, cannot be objected to on appeal where the admission was expressly made in the pleadings and no objection was made to the instruction in the court below); *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604 (where wife was permitted to testify that she was dependent upon husband for support); *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 523 (stating that it has been held strictly proper to show in evidence that the deceased left a family who have suffered pecuniary loss by reason of his death and to show the extent of such loss with reasonable certainty). See *supra*, § 26, as to dependency; *supra*, § 37, as to pleading pecuniary loss, and *supra*, § 56,

evidence of the poverty of the heirs which is not related to the death.² Inasmuch as collateral heirs and those heirs who are not entitled to support from deceased cannot recover substantial damages without showing pecuniary injury resulting from the death,³ it would seem that testimony as to the degree of support received by them from the decedent should be admissible. However, testimony as to the poverty of such heirs has been held inadmissible on the ground that it can have no other purpose than to create prejudice.⁴

Under section 1970 of the Civil Code it has been held that it is not error to admit evidence of poverty of parents of deceased, since that section makes the fact that the heirs are dependent, requisite for a recovery. The fact of their poverty by reason of the death of the deceased may be introduced, therefore, as showing such dependency.⁵

§ 73. Physical Incapacity of Beneficiary.—Evidence of permanent afflictions of heirs existing at the time of the

as to legal right to support as entitling to substantial damages.

2. *Mahoney v. San Francisco etc. Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518, where judge informed jury that if it did not come to an agreement all the expenses would fall upon the plaintiff who was not well off.

3. See *supra*, §§ 37, 63.

4. *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577, stating that extent of defendant's responsibility is not to be measured by the affluence or poverty of the injured party, since that is a condition for which the defendant is in no way responsible.

5. The word "dependent" as used in section 1970 of the Civil Code was intended to describe a condition

of actual dependency and not a dependency that rests on a presumption on account of relationship, for it is applied to persons to whom no such presumption obtains. It is therefore necessary for the parents or brothers and sisters to prove, not a mere relation of dependency, but an actual dependency. *Balakala Consol. Copper Co. v. Reardon*, 220 Fed. 584, per Gilbert, C. J. (holding admissible evidence that parents were very poor and son was their only support); *Soto v. Spring Valley Water Co.*, 39 Cal. App. 187, 178 Pac. 305 (holding that where action was brought under § 1970, Civ. Code, plaintiff was properly permitted to show that her son, decedent, was her only support).

death, by reason of which they had a right to expect from him, had he lived, a greater measure of comfort, care and assistance than had their afflictions not existed, may be introduced to aid the jury in its determination of appropriate damages. These are appropriate elements to be considered in determining the value of his life to the beneficiaries and as measuring their pecuniary loss.⁶ Some evidence of this kind is open to the objection that it tends to create a sympathy for or prejudice in favor of the plaintiffs, and when it has no other purpose it cannot be considered.⁷ But where the evidence is not so limited in its effect and tends to show a pecuniary loss such as medical attention, evidence is proper to show an invalid condition which existed prior to the death. Different care is required for an invalid child than for a normal one, and if defendant fears that such testimony may arouse sympathy, this may be provided against by charging the jury as to such evidence, that it may be considered only as an element of pecuniary loss.⁸ Thus in awarding damages it has been permitted to show that a surviving sister was an invalid suffering from a spinal disease,⁹ that children of deceased were crippled and had been for a long time under the doctor's care at the time of the death,¹⁰ and that for eight years prior to the death of the deceased the wife had been an invalid and unable to leave the house, and that he had been very kind and attentive to her.¹¹ So evidence has been held admissible to show the ill health of a wife as tending in some degree

6. *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544, per Lorigan, J.

7. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Green v. Southern Pacific Co.*, 122 Cal. 563, 55 Pac. 577; *Mahoney v. San Francisco etc. Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; see, *supra*, § 72.

8. *Simoneau v. Pacific Electric Ry.*, 159 Cal. 494, 115 Pac. 320, per Sloss, J.

9. *The Dauntless*, 121 Fed. 420.

10. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320, per Sloss, J.

11. *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604.

to establish the pecuniary loss sustained by her in the death of her husband.¹² Similarly evidence of the close, continuous and unusual care given by a decedent to an invalid mother has been held admissible, and, in connection with showing such care, evidence has been given as to the mother's physical condition during the period she was cared for by decedent.¹³ However, it is improper to admit evidence of the condition of a family respecting illness or misfortune suffered by some of its members subsequent to the death. Changed conditions in the family of the deceased, adverse circumstances or misfortunes in the way of sickness which are in no way connected with the death but occur subsequently thereto are not matters for which the defendant is responsible.¹⁴

§ 74. Character of Relations Between Deceased and Heirs.—In the leading case on the subject it was early held that the social and domestic relations of the parties, their kindly demeanor toward each other, are parts of all the circumstances for the jury to consider in estimating just damages from a pecuniary point of view.¹⁵ If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury may take into consideration the absence of social relations in estimating the loss sustained by one spouse from the death of the other. So if husband and wife had lived together in concord, each rendering kindly offices to the other, such facts may be considered—not for the

12. *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830.

13. *Meier v. Golden State Auto Tour Corp.*, 33 Cal. App. Dec. 735, 195 Pac. 290.

14. *Simoneau v. Pacific Electric Ry. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544, holding that while evidence of the permanent crippled condition of the two

children was competent evidence, evidence that the whole family or some members of it, after the death, suffered from scarlet fever, measles, mumps, chicken-pox, tonsillitis, and rheumatism of the heart, and that the widow lately had not enjoyed such good health as at the time of her husband's death, were all matters clearly inadmissible.

15. See *supra*, § 53.

purpose of affording solace in money but for the purpose of estimating pecuniary losses.¹⁶ Similarly evidence may be introduced to show that deceased was kind and loving to his children. The deprivation of the society, comfort, and care of a parent is a matter which may, as has already been pointed out, enter into the pecuniary loss. Such a consideration would obviously cut little, if any, figure in the estimation of such loss if the conduct of the parent were the opposite of kind and loving.¹⁷

Limitation of Actions.

§ 75. In General.—Under section 340 (subdivision 3) of the Code of Civil Procedure the time within which an action for wrongful death may be instituted is one year.¹⁸ The time begins to run from the day of the death of the injured person and not from the time the injury causing the death was inflicted.¹⁹ It follows, therefore, that the action must be commenced within the statutory period after the death.²⁰ Originally the time within which the

16. *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20, per Myrick, J. (stating that this is particularly true where there is nothing in the case to show that the jury are instructed that they may give damages by way of solace). See to similar effect, *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 Pac. 183; *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, 68 Pac. 771; *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604 (where testimony was introduced as to happy married life of deceased and his wife); *Evarts v. Santa Barbara etc. Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830. See, also, *supra*, § 53, and cases cited.

17. *Kramm v. Stockton Electric R. R. Co.*, 22 Cal. App. 737, 136 Pac. 523; *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604.

18. *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, 128 Pac. 330; *Hebert v. Byron Jackson Iron Works*, 39 Cal. App. 209, 178 Pac. 550 (but holding that statute did not run by reason of amendment to complaint); *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47.

19. *Marks v. Reissinger*, 35 Cal. App. 44, 169 Pac. 243.

20. *Benjamin v. Eldridge*, 50 Cal. 612 (which was two years at the time of this action); *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971.

action could be brought was two years and the clause containing the limitation was a part of the act giving the right of action, but upon the enactment of the codes the provision limiting the cause of action was re-enacted in section 339 of the Code of Civil Procedure.¹ By an act adopted in 1905, sections 339 and 340 of the Code of Civil Procedure was so amended as to limit the time for bringing the action to one year. Under this limitation were conjoined other actions such as for libel, slander, and the like, whereas the action for death through the wrongful act of another had formerly stood as a single cause in its own class. The change was brought about by simply dropping this cause of action out of section 339, prescribing the limitation of two years, and inserting it among other causes in section 340 prescribing a limitation of but one year.²

The Federal Employers' Liability Act establishes a limitation of two years within which an action thereunder must be commenced, such time to be computed from the date the cause of action accrued.³

1. It was held that if the statute of limitations had commenced running as to a cause of action before the codes took effect it continued to run notwithstanding the passage of the codes and was not lengthened by them, since the statute was substantially re-enacted in the code and the same limitation was re-enacted. *Benjamin v. Eldridge*, 50 Cal. 612.

2. *Gregory v. Southern Pac. Co.*, 157 Fed. 113, per Wolverton, D. J.; *Crothers v. Edison Electric Co.*, 149 Fed. 606. As to the effect of this amendment it has been held that for all actions arising after the amendment the law implied that the limitation should begin to run from the time the action accrued, but for

such as arose prior thereto and as to which the old statute had not yet run the omission of an express declaration as to the effect of the amendment indicated an intendment that the litigant should have the whole of the new period adopted in which to sue. *Crothers v. Edison Electric Co.*, 149 Fed. 606. See supra, §§ 38, 39, as to effect of statute on making of amendments.

3. *Bowman v. Southern Pac. Co.*, 36 Cal. App. Dec. 1058, 204 Pac. 403. See notes, 8 A. L. R. 145, and 16 A. L. R. 482, as to applicability of statute of limitations to limitation prescribed by statute which creates cause of action for wrongful death under Federal Employers' Liability Act.

§ 76. In Admiralty Courts.—It is now settled that admiralty courts will enforce the same limitation in regard to bringing an action for wrongful death as is enforced in the state where the cause of action arose. Thus where death results from a maritime tort committed on navigable waters within the state of California and the action is brought in the admiralty courts, it has been held that, if the statute of limitations of California has barred the action, it is likewise barred in admiralty.⁴

§ 77. In Foreign Jurisdiction.—The general rule that a right of action is governed by the *lex loci*, and the remedy by the *lex fori*, is altogether applicable as in actions *ex contractu*.⁵ The time within which an action shall be commenced in general pertains to the remedy. Where, however, a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue.⁶ It is clear from the statute of California first enacted with the limitation of the time for commencement of the action subjoined as a proviso, that the limitation constituted a condition attending the bringing of the action, and was designed as a part of the liability created, and could not have been considered apart from the act giving the right of action as a limitation statute simply.

4. *Western Fuel Co. v. Garcia* (U. S.), 66 L. Ed. 97, 42 Sup. Ct. Rep. 89, 90; reversing *Western Fuel Co. v. Garcia*, 255 Fed. 817, holding that although by the statute of limitations of California an action for wrongful death is barred after one year, yet when the statute as to such actions is applied in admiralty it will be enforced in accordance with the recognized principles of maritime law, unaffected

by the provisions of any state or local law. See *Flynn v. Christenson*, 273 Fed. 387, holding that Code Civ. Proc., § 340, subd. 3, does not limit the time of bringing such actions in a court of admiralty jurisdiction.

5. See *CONFLICT OF LAWS*, vol. 5, p. 449 et seq.

6. See *CONFLICT OF LAWS*, vol. 5, p. 433.

But a different intendment has been ascribed to the statute in its present form. Section 377 standing alone, as it does, gives the right of action merely without qualification or limitation. It follows, therefore, that a plaintiff suing in a foreign jurisdiction under the California statute is governed in the time of bringing the action by the law of the foreign jurisdiction.⁷

7. Gregory v. Southern Pac. Co., 157 Fed. 113, per Wolverton, D. J.

(S. W. S.)

DEBT.

1. Definition.
2. As Applied to Various Liabilities.
3. Time and Amount Due as Affecting.
4. Contingent Claims.
5. In Practice—Action of Debt.

§ 1. **Definition.**—Although it was early held that the technical meaning of the term “debt” as used in the statutes and in the constitutions both of the United States and of California is a sum of money due by contract express or implied,¹ and while it is true that such is its primary definition,² yet the term has a much broader popular significance. So considered it includes that which is due from one person to another, whether money, goods or services, and has been variously defined as that which one person is bound to pay to another or to perform for his benefit; a thing owed; an obligation; a liability;³ a judgment,—a debt of record.⁴ In statutes the term is therefore often construed as including liabilities,⁵ and any sort of obligation to pay money.⁶ But the manner in

1. *Perry v. Washburn*, 20 Cal. 318, holding that congress in speaking of “debts” intended the legal tender act to include such obligations for the payment of money as are founded on contract, and that taxes were not included.

2. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; citing 3 *Blackstone's Commentaries*, 154.

3. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

4. *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518.

5. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, per Searls, C.

6. *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518.

Cases are cited in this article to and including 186 Cal., 44 Cal. App. and 206 Pac.

which the debt is to be paid or the means of coercing payment do not enter into the definition.⁷ Thus the term has been held to have an application as broad as that of the word "claim," and to include a demand for damages arising from a tort.⁸

§ 2. As Applied to Various Liabilities.—It has been said that wherever the term "debt" is used in the code it is used in the sense of demands or obligations upon contracts payable in money.⁹ To illustrate: An executor or administrator "must . . . collect all debts due to the decedent or to the estate."¹⁰ Manifestly he is thereby authorized to collect not only all demands on contracts payable in sums certain but also those obligations or demands capable of liquidation.¹¹ A similar construction should be placed upon statutes which refer to debts of husband and wife, thus: "The earnings of the wife are not liable for the debts of the husband."¹² "The separate property of the husband is not liable for the debts of the wife contracted before marriage."¹³ In these provisions it is said to be plain that the construction to be put on the statute is, not that the spouses are simply to enjoy immunity from such contracts for sums of money due by certain and express agreement which fixes the amount due independent of extrinsic circumstances—from such contracts as would have supported an action of debt at com-

7. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518, stating that the court which ordered payment might have coerced it, but if not an action would lie upon the judgment rendered in the case.

8. *Berson v. Ewing*, 84 Cal. 89, 23 Pac. 1112, referring to statutory provision, section 2461 of the Civ. Code, which stipulated that a partner authorized to act in liquida-

tion may collect, compromise or release any debts due to the partnership, pay or compromise any claim against it, and dispose of the partnership property.

9. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, per Searls, C.

10. Code Civ. Proc., § 1581. See EXECUTORS AND ADMINISTRATORS.

11. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

12. Civ. Code, § 168.

13. Civ. Code, § 170. See also, Civ. Code, § 171.

mon law—but rather that the word “debt” is to be used in its modern legal significance as including any sort of obligation to pay money and that it signifies what either spouse owes.¹⁴ So it has been held that the term “debt” used in a statute regulating the State Agricultural Society, “that in no event shall the state be liable for any . . . debt created by said board of agriculture,” was intended to hold the state free from liability for the obligations which the board might incur, calling directly or indirectly for the payment of money.¹⁵ Other liabilities held to be debts include a claim for money obtained by an agent in the sale of goods of his principal and withheld from the principal;¹⁶ an excess called for in a county warrant to allow for a depreciation in the value of such warrant;¹⁷ rent due and unpaid;¹⁸ and obligation to pay a license tax.¹⁹

In certain statutes, however, the term still retains its more technical meaning. Thus the word “debt” as used in the law of garnishment includes only legal debts—causes of action upon which the defendant in the attachment under the common-law practice can maintain an action of debt or indebitatus assumpsit—and not mere equitable claims.²⁰ And it was held that the term as used in the Legal Tender Act of the United States did not include taxes.¹ For further illustrations of the construction of the term in respect to other relations reference should be had to the appropriate titles in this work.²

14. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. See HUSBAND AND WIFE.

15. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, per Searls, C.

16. *In re Holdforth*, 1 Cal. 438.

17. *Foster v. Coleman*, 10 Cal. 278. See COUNTIES, vol. 7, p. 523, as to debts which can be contracted by county officers.

18. *Knutte v. Superior Court*, 134 Cal. 660, 66 Pac. 875.

19. *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682.

20. *Redondo Beach Co. v. Brewer*, 101 Cal. 322 35 Pac. 896; *Hassie v. God is With Us Congregation*, 35 Cal. 378. See GARNISHMENT.

1. *Perry v. Washburn*, 20 Cal. 318.

2. See ARREST, vol. 3, p. 140, as to what constitutes “debt” within constitutional provision prohibiting arrest for debt in civil action; AT-

§ 3. Time and Amount Due as Affecting.—The question whether or not a claim or demand is a debt is in no respect determined by reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. If it is sought to distinguish between the two, it may be said of one that it is a debt owing and of the other that it is a debt due.³ A debt, whether liquidated or unliquidated, is given legal recognition. Thus there has never been any doubt that a mortgage given to secure an unliquidated debt may be upheld.⁴ An “unliquidated debt,” however, within the meaning of that expression as it is used in the sense that its payment is capable of being secured by a mortgage, is a debt which, while not actually existing when the contract of hypothecation is made, is, from the nature of the contract and the whole subject matter thereof, inherently capable of coming into existence. It simply means a debt the exact amount

TACHMENT, vol. 3, p. 413 et seq., and in particular, pp. 418, 424. As to provable debts in bankruptcy, see BANKRUPTCY, vol. 4, p. 55; see also p. 86 as to discharge. As to debt barred by statute of limitations as consideration for agreement, see CONTRACTS, vol. 6, p. 184. As to situs of debt for purposes of attachment, see CONFLICT OF LAWS, vol. 5, p. 478. As to liability for debts on division of county or municipality, see COUNTIES, vol. 7, p. 401; MUNICIPAL CORPORATIONS. As to contracts of guaranty, see GUARANTY. As to acknowledgment of debt sufficient to take out of operation of statute of limitations, see LIMITATION OF ACTIONS. As to payment of debt in general, see PAYMENT. As to release of debt, see RELEASE. As to sufficiency of evidence of debt, see FRAUDS, STATUTE OF. As to deduction of debt in taxes, see TAXATION.

As to larceny or embezzlement as affected by purpose to take or retain property in payment of or as security for a debt, see note, 13 A. L. R. 142; robbery or assault to commit robbery as affected by intent to collect debt, see note, 13 A. L. R. 151. See also cross-references in the article, DEBTOR AND CREDITOR.

3. *People v. Arguello*, 37 Cal. 524, per Sanderson, J., holding that the word “debts,” as used in the revenue laws of California, include not only debts due and payable on or before the first Monday of December of the year for which an assessment is made, but debts to become due and payable at any time thereafter.

4. *Hayashi v. Pacific Fruit Exchange*, 43 Cal. App. 677, 186 Pac. 174, per Hart, J. See CHATTEL MORTGAGES, vol. 5, p. 69; MORTGAGES.

of which cannot be known at the time the mortgage is given.⁵

§ 4. Contingent Claims.—A sum payable upon a contingency is not a debt and cannot become such until the contingency happens.⁶ Thus it has been held that the wages of a sailor being contingent upon the arrival of the ship are not a debt until the ship has arrived and, therefore, until then not attachable. So of a covenant to pay rent quarterly, such a covenant creates no debt until the rent becomes due, for before that time the lessee may quit with the consent of the lessor, or he may assign his term with consent, or he may be evicted by a title paramount to that of the lessor, in any of which cases he will be discharged from his covenant. So a contract between shippers of a cargo and owners of the ship that the latter should receive a share of the profits does not create a debt from the former to the latter until the termination of the voyage.⁷ Upon this principle it has been held that where work is to be done in the future for a municipal corporation and is to be paid for in installments as the work progresses, no debt or liability is created for the aggregate amount of the installments to be paid under the contract at the time of entering into the contract, but the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed.⁸

5. *Hayashi v. Pacific Fruit Exchange*, 43 Cal. App. 677, 186 Pac. 174, per Hart, J.

6. *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958; *People v. Arguello*, 37 Cal. 524.

7. *People v. Arguello*, 37 Cal. 524, per Sanderson, J.

8. *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958 (holding that in order to render a contract void under the

constitution it must appear that an indebtedness or liability had been incurred for some year exceeding the income and revenue provided for that year); *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; *Smilie v. Fresno County*, 112 Cal. 311, 44 Pac. 556; *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, 31 L. R. A. 794, 44 Pac. 358. See MUNICIPAL CORPORATIONS.

§ 5. **In Practice—Action of Debt.**—In practice “debt” was a common-law form of action to recover a specified sum of money alleged to be due.⁹ Thus where there was an agreement under seal containing a penalty the plaintiff could bring debt for the same. After judgment if it appeared that the demand was not for damages liquidated but was a penalty the defendant could seek relief in equity.¹⁰ The action of debt also lay to enforce a statutory duty or penalty or forfeiture. Hence when a statute cast upon a party an obligation to pay money to particular persons without providing a remedy for its recovery, an action of debt lay. In case the suit was a civil action for the recovery of money due the state, the action was properly brought in the name of the state.¹¹ However, where the statute prescribed both the right and the remedy, that remedy could alone be pursued. On this principle it was held that where a statute made it a criminal offense to pursue a given occupation without a license, an action of debt would not lie to recover the amount of the license but the only redress was by indictment.¹² Under the code system, however, common-law forms of action are abolished, and the action of debt is no longer used.¹³

9. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

10. *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 18 Pac. 90.

11. *State v. Poulterer*, 16 Cal. 514, holding that if a personal liability was imposed for the payment

of a tax and the act was silent as to the mode of enforcement, then the action was proper.

12. *People v. Craycroft*, 2 Cal. 243, 56 Am. Dec. 331.

13. See *ACTIONS*, vol. 1, p. 309.

DEBTOR AND CREDITOR.

- I. IN GENERAL.
- II. ACTIONS AGAINST SEVERAL DEBTORS.

I. In General.

- 1. Scope of Article—Definitions.
- 2. Illustrations of Relation.
- 3. Creation of Relation.
- 4. Extinguishment of Relation.
- 5. Transfers by Debtor.
- 6. Joint and Several Obligations.

II. Actions Against Several Debtors.

- 7. Parties—Counterclaims.
- 8. Death or Discharge as Affecting.
- 9. Judgment.
- 10. Proceedings After Judgment.

I. IN GENERAL.

§ 1. **Scope of Article—Definitions.**—The general principles of the relationships under which one person becomes indebted to another pervade more or less intimately a large number of legal subjects which furnish material for specific articles in this work to which reference should be had.¹ Such related topics are here only touched upon

1. As to divorced wife as creditor of AND SEPARATE MAINTENANCE, vol. 1, husband as to alimony, see ALIMONY p. 1048 et seq. As to insolvency of

Cases are cited in this article to and including 186 Cal., 44 Cal. App. and 206 Pac.

as it becomes necessary for the sake of illustration or otherwise to draw general rules therefrom.

Part II of Division IV of the Civil Code relates to "Special Relations of Debtor and Creditor." Title I of the part contains general principles. Section 3429 is as follows: "A debtor within the meaning of this title, is one who, by reason of an existing obligation is or may become liable to pay money to another, whether such liability is certain or contingent."² A debtor has also been defined as one who owes anything or who is under obligation arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another.³ The term is a broad one and has been held to include corporations as well as individuals and partnerships.⁴

A creditor is one in whose favor an obligation exists by reason of which he is or may become entitled to the pay-

debtor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 312; BANKRUPTCY, vol. 4, pp. 47, 72; BANKS, vol. 4, p. 305 et seq.; CORPORATIONS; INSOLVENCY; PARTNERSHIP. As to relation of debtor and creditor between bank and depositor, see BANKS, vol. 4, p. 186 et seq. As to composition agreements by debtor with creditors, see COMPOSITION WITH CREDITORS, vol. 5, p. 373. As to compromise and settlement between, see COMPROMISE AND SETTLEMENT, vol. 5, p. 383. As to contribution between joint debtors, see CONTRIBUTION, vol. 6, p. 497. As to relation of debtor and creditor between subscriber for stock and corporation, see CORPORATIONS, vol. 6, p. 828. As to creditors of decedent's estates, see EXECUTORS AND ADMINISTRATORS. As to exemptions, see EXEMPTIONS; HOMESTEADS. As to conveyances fraudulent as to creditors, see FRAUDULENT CONVEYANCES. Whether

relation of debtor and creditor is established by judgment, see JUDGMENTS. As to relative rights of creditors where different funds are available for payment of debts, see MARSHALING ASSETS. As to payment by debtor and designation of debt to which payment is to be applied, see PAYMENT. As to release of debtor and joint obligors, see RELEASE. As to rights and liabilities of debtor imprisoned in state prison, see PRISONS AND PRISONERS. As to tender by debtor, see TENDER. And see, other specific titles.

2. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *Potts v. Mehrmann*, 34 Cal. App. Dec. 106, 195 Pac. 941; *Calkins v. Howard*, 2 Cal. App. 233, 83 Pac. 280.

3. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; citing *Stanly v. Ogden*, 2 Root (Conn.), 259.

4. *Merced Bank v. Ivett*, 127 Cal. 134, 59 Pac. 393.

ment of money.⁵ It is clear that one cannot in his individual capacity occupy the double position of debtor and creditor.⁶

§ 2. Illustrations of Relation.—In accordance with the well-known principle that an agent who contracts in his own name is personally liable,⁷ it has been held that where dealings are with a person who does not assume to be acting as agent for any other person and credit is given to him and money advanced at his request, a promise to repay it is implied if not made in express terms and the parties advancing the money are creditors to the amount of their advances.⁸ And one signing as principal will be held as such notwithstanding the creditor knows that as between the one thus signing and the principal debtor the former is in fact only a surety.⁹ It has been said that one having a claim for a tort is a creditor before the commencement of an action thereon as well as after, in relation to setting aside fraudulent transfers of the debtor,¹⁰ but it has been held that a trespasser and tortfeasor is not a debtor in the sense of the statute in relation to attachments.¹¹ A divorced wife who has obtained a judgment granting her alimony is a creditor of her former husband, at least so far as her right of setting

5. Civ. Code, § 3430; *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416; *Potts v. Mehrmann*, 34 Cal. App. Dec. 106, 195 Pac. 941; *Calkins v. Howard*, 2 Cal. App. 233, 83 Pac. 280.

6. *Smith v. Truebody*, 2 Cal. 341.

7. See AGENCY, vol. 1, pp. 814, 819 et seq.

8. *Burling v. Newlands*, 112 Cal. 476, 44 Pac. 810 per Beatty, C. J., stating that this would be true independent of any provision of the

code and is clearly so under its definition of debtor and creditor.

9. *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38. See SURETYSHIP.

10. *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709.

11. *Johnson v. Lamping*, 34 Cal. 293, stating that although the party injured could by waiving the tort treat him as his debtor, yet until the tort was so waived he could not be treated as a debtor. See GARNISHMENT; also ATTACHMENT, vol. 3, p. 413.

aside his fraudulent conveyances is concerned.¹² And a mortgagee is none the less a creditor because the payment of the debt due him is secured by a lien on specific property.¹³ Where pending the administration of an estate the remainderman and the life tenant executed an agreement by the terms of which the tenant agreed to keep the improvements in repair during the life estate and to paint at reasonable intervals, while the remainderman agreed to pay the taxes and to keep the premises insured, it was held that such facts were sufficient to show the relation of debtor and creditor between the tenant and the remainderman.¹⁴

§ 3. Creation of Relation.—Ordinarily, in order to create the relation of debtor and creditor there must be privity of contract between the parties.¹⁵ It follows that as a general rule no one can be made a debtor for money paid to his use unless it was done at his request or with his consent or unless the party paying the money was bound

12. *Tuers v. Tuers*, 131 Cal. 625, 63 Pac. 1008 (but stating that she is not in strictness a creditor of the husband at the time of the commencement of the action); *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1049 et seq.

13. *Calkins v. Howard*, 2 Cal. App. 233, 83 Pac. 280, holding that as to this property he is a preferred creditor, but if a balance is due after the security is exhausted his right to have recourse against the general assets of his debtor is unquestionable. See MORTGAGES.

14. *Potts v. Mehrmann*, 34 Cal. App. Dec. 106, 195 Pac. 941 (in regard to setting aside fraudulent conveyances).

15. *Hassie v. God is With Us*

Congregation, 35 Cal. 378, holding that where A contracted with B in writing to construct a building for him, and B agreed to pay a certain sum therefor, payable in installments as the work progressed and C then contracted with A to do a part of the work for a sum to be paid in installments as the work progressed, and A assigned to C a part of the money to fall due on B's contract equal to the sum to be paid C, no such legal demand existed in favor of C against B as was liable to garnishment by C's creditor. See NEGOTIABLE INSTRUMENTS, for principle that bill of exchange must be accepted by drawee before it becomes binding upon him. But see EMINENT DOMAIN, ESTOPPEL, TAXATION, etc., where relation arises through factors other than privity.

as surety or otherwise to pay it for him.¹⁶ It is equally true that where one person assumes to pay the debt of another the creditor is not bound to accept him as a debtor. However, a creditor becomes bound when he so acts that it may be implied that he has accepted the new debtor in lieu of the old. Thus it has been held that where two or more corporations are legally consolidated, although such consolidation does not relieve either of the corporations from its liabilities, yet the consolidated corporation may assume and make itself liable for the antecedent liabilities of such consolidating companies, and while such agreement does not, without their assent, bind creditors, yet suit brought by a creditor upon a demand so assumed against the corporation which has agreed to pay is of itself sufficient evidence of acceptance of the new debtor. And in such case the debtor having of its own volition assumed the position cannot be permitted to divide up the obligation and thereby reduce the responsibility. It must be held to be liable precisely as though it had been the sole actor from the outset.¹⁷ As has been pointed out in another article the relation of debtor and creditor arises when a general deposit for exchange or credit is made in a bank or similar institution, the title to the money passing to the person with whom it is deposited and such person becomes the debtor of the depositor for the amount thereof.¹⁸ There is no presumption that one party is indebted to another. It follows that one who

16. *Treat v. Craig*, 135 Cal. 91, 67 Pac. 7; *Wolters v. Henningsan*, 114 Cal. 433, 46 Pac. 277; *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19; *McGee v. City of San Jose*, 68 Cal. 91, 8 Pac. 641 (where subsequent to making of contract for street work the legislature changed the parties to whom payment was to be made);

Curtis v. Parks, 55 Cal. 106. See CONTRIBUTION.

17. *Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210, 33 Pac. 53. See as to consolidated corporations, CORPORATIONS, vol. 6, p. 646; and see GUARANTY.

18. *Fidelity Sav. etc. Assn. v. Rodgers*, 180 Cal. 683, 182 Pac. 426. See BANKS, vol. 4, p. 186.

claims that he has loaned money to another must prove his claim or demand in an action to recover the money.¹⁹

§ 4. Extinguishment of Relation.

“Full performance of an obligation by the party whose duty it is to perform it or by any other person on his behalf and with his assent if accepted by the creditor, extinguishes it.”²⁰

Thus where a party obligated to another promises to fulfill his obligation in a certain manner acceptable to his obligee, and thereafter complies with and fully performs such promise, such performance on his part extinguishes whatever obligation previously has existed and leaves nothing upon which a claim can be based by the creditor.¹ However, there must be an intent on the part of the debtor and creditor to extinguish the debt.² The acceptance of the creditor must be real. It is therefore apparent that a party does not cease to be a creditor by reason of a transaction which is procured by fraud.³

19. *Atkinson v. Foote*, 44 Cal. App. 149, 186 Pac. 831.

20. Civ. Code, § 1473; *Dodds v. Spring*, 174 Cal. 412, 163 Pac. 351; *Drinkhouse v. Merritt*, 134 Cal. 580, 66 Pac. 785; *Yule v. Bishop*, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094 (holding that where surety pays debt, inasmuch as the principal obligation is extinguished, the action of the surety is upon assumpsit which the law implies where a surety is compelled to advance money for his principal); *Wright v. Mix*, 76 Cal. 465, 18 Pac. 645; *Bray v. Cohn*, 7 Cal. App. 124, 93 Pac. 893; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075; *Crystal v. Hutton*, 1 Cal. App. 251, 81 Pac. 1115. See *CONTRACTS*, vol. 6, p. 414, and

see *SURETYSHIP*, as to remedy of surety who has paid debt of principal.

1. *Drinkhouse v. Merritt*, 134 Cal. 580, 66 Pac. 785, holding that where a person promised to make reparation and compensation for certain wrongs by provision “hereinafter mentioned in his will,” such promise was fully performed by leaving a will at his death to the effect agreed upon.

2. *Erkenbrecher v. Grant*, 62 Cal. Dec. 302, 200 Pac. 641, where transaction was held to be purchase and not payment of obligation.

3. *Burling v. Newlands*, 112 Cal. 476, 44 Pac. 810. See *FRAUD AND DECEIT*.

§ 5. Transfers by Debtor.

"In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract."⁴

And by the settled rule of the common law now expressed in the code

"A debtor may pay one creditor in preference to another or may give to one creditor security for the payment of his demand in preference to another."⁵

4. Civ. Code, § 3431; *Hopper v. Keys*, 152 Cal. 488, 92 Pac. 1017 (but holding section did not benefit creditors who had not met the requirement of the statute in regard to the recording of chattel mortgages); *Heath v. Wilson*, 139 Cal. 362, 73 Pac. 182; *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46 (holding that the fact that one of the debtors made false and inconsistent statements as to financial standing of a firm of which he was a member, which was unable to meet its obligations at the time of the transfer of property to pay a creditor of the firm, cannot affect the preferred creditor who had no knowledge on the subject of their financial standing and was not shown to have had any knowledge of or participation in the misrepresentations made); *Parkinson Brothers Co. v. Figel*, 24 Cal. App. 701, 142 Pac. 135.

5. Civ. Code, § 3432; *McKee v. Title Ins. & Trust Co.*, 159 Cal. 206, 113 Pac. 140; *Heath v. Wilson*, 139 Cal. 362, 73 Pac. 182 (stating that a person, although insolvent, residing within or without this state, may transfer property in this state in good faith to a particular creditor for the purpose of paying or securing the whole or a part of a

debt owing to such creditor, whether in his own right or otherwise); *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46; *In Re Strock*, 128 Cal. 658, 61 Pac. 282 (provided such preference is not to hinder, delay or defraud his creditors in contemplation of insolvency); *Sabichi v. Chase*, 108 Cal. 81, 41 Pac. 29 (stating, however, that such preferential payment or security must not be cast into the form of an assignment for the benefit of creditors); *La Point v. Boulware*, 104 Cal. 264, 37 Pac. 927; *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323; *In re Luce*, 83 Cal. 303, 23 Pac. 350; *Lawrence v. Neff*, 41 Cal. 566 (stating that a conveyance to the creditor himself is not an "assignment" in the sense of the statute forbidding assignments for the benefit of creditors which favor certain creditors); *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204; *Commercial Nat. Bank v. Roberts*, 33 Cal. App. Dec. 477, 194 Pac. 751; *First Nat. Bank v. Ranger*, 33 Cal. App. Dec. 292, 193 Pac. 783; *Denehy v. Stewart*, 41 Cal. App. 88, 181 Pac. 839 (it is only where the transfer is made or given voluntarily or without a valuable consideration by a party while insolvent or in contemplation of insolvency that the

He may make such preference even though he be insolvent and the creditor be aware at the time that it will have the effect of defeating the collection of other debts, provided there is no bankrupt or insolvent law making a different disposition of it.⁶ The object or purpose being lawful the manner in which it is done is immaterial,⁷ provided the transfer be an absolute and not a colorable one and be for a valuable consideration.⁸ The use of the broad term "debtor" in the statute has been held to include corporations as well as partnerships and individuals who are indebted, and give to corporations equally with individuals the right to prefer one creditor above another.⁹

The source of the right of a debtor to contract and make transfers comes, as has been said, "from that absolute ownership which every man claims over that which is his own."¹⁰ As was said by Justice Field in an early case:

statute declares such transfer to be fraudulent and void as to existing creditors); *Parkinson Brothers Co. v. Figel*, 24 Cal. App. 701, 142 Pac. 135; *Crane Co. v. Dryer*, 9 Cal. App. 290, 98 Pac. 1072 (when such preference is induced by motives which would not amount to fraud of the rights of the other persons or creditors). See ASSIGNMENT FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES.

6. See BANKRUPTCY; INSOLVENCY; *Heath v. Wilson*, 139 Cal. 362, 73 Pac. 182; *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323; *Dana v. Stanfords*, 10 Cal. 269 (stating that to avoid the conveyance there must be a real design on the part of the debtor to prevent the application of his property in whole or in part to the satisfaction of his debts, and a creditor violates no rule of law when

he takes payment or security for his demand though others are thereby deprived of all means of satisfaction of their own equally meritorious claims); *Commercial Nat. Bank v. Roberts*, 33 Cal. App. Dec. 477, 194 Pac. 751; *First Nat. Bank v. Ranger*, 33 Cal. App. Dec. 292, 193 Pac. 788.

7. *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323.

8. *Saunderson v. Broadwell*, 82 Cal. 132, 23 Pac. 36, holding that a pre-existing indebtedness constitutes a valuable consideration and also the promise to pay a debt due from the grantor of property to a third person is a valuable consideration.

9. *Merced Bank v. Ivett*, 127 Cal. 134, 59 Pac. 393.

10. *Heath v. Wilson*, 139 Cal. 362, 73 Pac. 182 (stating that the statutory provisions are but declarations

"From the power which a man possesses over his own property it follows that he can dispose of it in any manner he may see fit which does not contravene the general policy of the law. That policy restricts the power of disposition so as to prevent the withdrawal of the property from the claims of his creditors. It is no part of such policy to inhibit its application to the payment of one debt rather than another."¹¹

The law in this connection is principally concerned with transfers and conveyances, to defraud creditors, a subject which is fully treated in another article.¹²

§ 6. Joint and Several Obligations.—An obligation imposed upon several persons or a right created in favor of several persons may be joint, several, or joint and several,¹³ and in the absence of express words to the contrary, obligation on such right is presumed to be joint rather than several,¹⁴ save and except in cases where the parties who unite in a promise receive some benefit from the consideration whether past or present,¹⁵ or execute a promise in the singular number, in which event their promise is presumed to be joint and several.¹⁶ However,

of the rule of the common law); *Matter of Muller*, 118 Cal. 432, 50 Pac. 660, quoting Chief Justice Marshall.

11. *Dana v. Stanfords*, 10 Cal. 269.

12. See FRAUDULENT CONVEYANCES.

13. Civ. Code, § 1430; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130 (holding that where obligation is by its express terms joint, Civ. Code, § 1430, has no application).

14. Civ. Code, § 1431; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; holding that especially is this the rule as to the legal liability of part-

ners upon their partnership obligations. But see *Brooke v. Glide*, 39 Cal. App. 534, 179 Pac. 546, where one of two partners owning a ranch as tenants in common signed in the name of the partnership without authority from the other partner a contract employing a real estate broker to sell the ranch and agreeing to pay a commission therefor, the contract was not, so far as he was concerned a joint contract but a joint and several contract on which he was individually liable. See PARTNERSHIP.

15. Civ. Code, § 1659; *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088.

16. Civ. Code, § 1660; *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

the presumption that such obligation or right is joint may be rebutted.¹⁷ It is equally true that where the parties receive some benefit from the consideration, although the law presumes such promise to be joint and several, the presumption is overcome and the promise must be enforced according to its express terms where it clearly appears that the intention was that the promise should be joint.¹⁸ Where several persons obligate themselves to pay several sums of money, their obligation is several and not joint, notwithstanding that the sum agreed to be paid by each goes to make up an aggregate sum.¹⁹

There is no question but that performance of an obligation by one of several persons who are jointly liable under it extinguishes the liability of all.²⁰

II. ACTIONS AGAINST SEVERAL DEBTORS.

§ 7. Parties—Counterclaims.—When a liability is joint all the persons upon whom it rests must be united as defendants in an action upon the obligation. This rule is general and applies to undertakings, obligations and promises of all possible descriptions.¹ But where the liability is joint or several and is contractual and the sum-

17. *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892; *Conde v. Dreisam Gold Min. Co.*, 3 Cal. App. 583, 86 Pac. 825 (promissory note);

18. *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088.

19. *Craig v. Fry*, 68 Cal. 363, 9 Pac. 550; *Moss v. Wilson*, 40 Cal. 159; *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379. See also *CONTRACTS*, vol. 6, p. 341.

20. Civ. Code, § 1474; *Los Angeles National Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58; *National Bank v. Los Angeles I. & S. Co.*, 2 Cal. App. 659, 84 Pac. 466, 468; *Enscoe*

v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075. And it is likewise statutory law that "a party to a joint or joint and several obligation who satisfies more than his share of the claim against all may require a proportionate contribution from all the parties joined with him." Civ. Code, § 1432. See *CONTRIBUTION*, vol. 6, p. 509.

1. *Farmers' Exchange Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088; quoting *Pomeroy's Code Remedies*, § 271; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456. See *Code Civ. Proc.*, § 382; *PARTIES*.

mons is served on one or more but not on all of the defendants, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.² The Practice Act formerly provided that "If the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise direct,"—that is to say, unless the court requires the other defendants to be served before proceeding to trial and judgment.³

In an action against two or more joint debtors to enforce their joint liability the summons being served on all of them, one of the defendants cannot set up by way of counterclaim a cause of action existing in his favor alone against the plaintiff.⁴

§ 8. Death or Discharge as Affecting.—A right of action on a promise for the payment of money to two joint promisees vests, on the death of one, in the survivor, but the right of the deceased promisee is not extinguished by his death. The survivor will hold the security and the proceeds as trustee to the extent of the interest of the deceased.⁵ And the discharge of one of several joint debtors from a joint debt against them which does not relate to the merits of the contract but only to his personal privilege to be discharged therefrom, like a plea of infancy or of bankruptcy or of the statute of limitations, is not available to the remaining joint debtors who have not the same personal privilege and therefore does not entitle them to a dismissal of an action against them.⁶

2. Code Civ. Proc., § 414. See PARTIES.

3. *Tay v. Hawley*, 39 Cal. 93.

4. *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130. See SET-OFF AND COUNTERCLAIM.

5. *Denigan v. San Francisco Sav.*

Union, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390. See EXECUTORS AND ADMINISTRATORS.

6. *Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592; wherein the court did not seek to ascertain the effect of § 1543, Civ. Code, in regard to release of one of several joint debtors, since it was not raised by counsel. See RELEASE.

§ 9. Judgment.—Where a cause of action against debtors is several as well as joint, a several judgment may be entered without reference to the mere form of action.⁷ So, too, when the cause of action is against several defendants jointly, a portion only of whom are served, judgment may be taken against those served under section 414 of the Code of Civil Procedure,⁸ and proceedings may afterward be had in such cases against those not served under section 989, etc., of that code.⁹ At common law where several persons are sued as joint debtors the general rule is that the plaintiff must recover against all or none,¹⁰ but this rule was modified by the Practice Act and later by the code, and the rule now is that judgment may be given for or against several plaintiffs and for or against one or more of several defendants.¹¹

§ 10. Proceedings After Judgment.—By a provision of the Practice Act now incorporated into the code a defendant who was not originally served with summons in a suit against joint debtors may be bound by the judgment.¹² The code provides that when a judgment is recovered against one or more of several persons jointly indebted

7. *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599.

8. See *supra*, § 7; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; *Tay v. Hawley*, 39 Cal. 93.

9. *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. See *infra*, § 10. See JUDGMENTS.

10. *Dobbs v. Purington*, 136 Cal. 70, 68 Pac. 323; *Lewis v. Clarkin*, 18 Cal. 399; but stating that this rule is not applicable to our practice in spite of *Stearns v. Aguirre*, 6 Cal. 176, which held to that effect.

11. Code Civ. Proc., § 578, and see Practice Act, § 145; *Dobbs v.*

Purington, 136 Cal. 70, 68 Pac. 323; *Tay v. Hawley*, 39 Cal. 93; *Lewis v. Clarkin*, 18 Cal. 399. See JUDGMENTS.

12. Code Civ. Proc., §§ 989-994. See Practice Act, §§ 368-373; *Feder v. Epstein*, 69 Cal. 456, 10 Pac. 785; holding that where an action is brought against two defendants alleged to be partners but sued by their individual names, to enforce a partnership liability, and the summons is served on only one of them who makes default, the plaintiff is not entitled to a judgment against both defendants as provided in Code Civ. Proc., § 388; *Tay v. Hawley*, 39 Cal. 93.

upon an obligation, those who were not originally served with the summons may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served.¹³ The party so brought in may answer, "denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered by reason of any defense existing at the commencement of the action."¹⁴ Thus it appears that he cannot plead the statute of limitations.¹⁵ Should he in his answer deny the judgment, the summons and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment and the answer constitute such written allegations.¹⁶ If judgment is rendered against him, "it must be for not exceeding the amount remaining unsatisfied on such original judgment with interest thereon."¹⁷ The entire method of procedure, including the written allegations, which constitute the pleadings, the defenses permitted, the issues to be tried and the nature of the judgment to be entered, is clearly pointed out

13. Code Civ. Proc., § 989; *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37; *Tay v. Hawley*, 39 Cal. 93; *Colquhoun v. Pack*, 32 Cal. App. 97, 161 Pac. 1168 (holding that evidence that the defendant summoned was associated with the defendant against whom judgment was obtained in the ownership of certain placer claims and that the latter bought supplies from the plaintiffs for the purpose of developing such claims and that defendant summoned never at any time repudiated liability for such supplies but, on the other hand, endeavored to raise money to pay for the same, suffi-

ciently showed a joint indebtedness). See Code Civ. Proc., § 990, as to requisites of summons which must describe the judgment and require the person summoned to show cause why he should not be bound by it; and Code Civ. Proc., § 991, as to requisites of affidavit accompanying summons.

14. Code Civ. Proc., § 992.

15. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37.

16. Code Civ. Proc., § 993; *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37.

17. Code Civ. Proc., § 994; *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37.

and prescribed.¹⁸ It has been reasoned that, were it not for the statute, no action could be maintained against him, for the reason that it would become merged in the first judgment and the merger is restrained only for the purpose and to the extent of enabling the proceedings to be had as prescribed in the statute.¹⁹ The entire proceeding is statutory and exclusive and is in the nature of an action upon a judgment in which the pleadings upon which the judgment rests cannot be amended.²⁰ And the court therefore has no jurisdiction to open up the original case upon which the judgment was rendered and permit an amendment to a complaint which has become fixed by the judgment and upon which the judgment is based. It is clear that such an amendment, if allowed, might change the cause of action.¹

18. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37.

19. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37; *Tay v. Hawley*, 39 Cal. 93, stating that the provisions are useless if it is true that an action can be maintained on the judgment against a defendant not served in the former action.

20. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37; *Waterman v. Lipman*, 67 Cal. 26, 6 Pac. 875 (nor can the judgment in the former action be amended).

1. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37, per Lorigan, J., holding that it was error to permit amend-

ment of the complaint in the supplementary action to charge a liability on a note different from that which was alleged in the original complaint.

The only purpose of the complaint under these proceedings is to disclose the obligation upon which the original judgment was rendered. It will be further noticed that the statute makes no provision for a demurrer by the incoming defendant to the original complaint. This is certainly a right which would have been accorded him if amendment to the original complaint could be permitted. *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37.

(S. W. S.)

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